(1)

CASE NO. 90-1095

In The Supreme Court of the United States

OCTOBER TERM 1990

FRANCES A. ARMSTRONG, *et al.*

Petitioners

v.

MARATHON OIL COMPANY

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Can shareholders forcibly be divested of their ratable shares of a corporation without the right to seek just compensation in a court of law or does this constitute a "taking" of a contract protected by the contract clause of the United States Constitution, for which just compensation is guaranteed by the Fifth Amendment of the Constitution as applied to states by the due process clause of the Fourteenth Amendment?

Can a state create a single arbitrary formula of just compensation for the taking of a contract, or must state law specify that the trial court admit all relevant evidence proving the full monetary equivalent of the contract taken?

If a federal court first dismisses minority shareholder actions stemming from a cash-out merger by ruling as a matter of state law that a state appraisal remedy for dissenting shareholders is their exclusive potential remedy for the taking of their shares, may the state courts in that appraisal action subsequently rule in direct contradiction to the federal court while refusing to join or allow revival of those other remedies, or does the due process clause of the fourteenth amendment require the state court to either join the various causes of action or to reinstate the alternative action in statu quo ante?

Can a state evade the payment of just compensation for the taking of corporate shares by allowing disparate compensation for the shares of different shareholders, or does the equal protection clause of the Fourteenth Amendment to the Constitution force state law to offer equal payment for equal contracts taken?

May a state legislature redefine a remedy previously existing at common law so as to create a "special proceeding" for the purpose of contravening the right to a jury trial? Alternatively, does the Seventh Amendment to the Constitution provide the right to a jury trial for the taking of a contract protected by the contract clause?

Does the due process clause of the fourteenth amendment require the payment of equitable prejudgment interest upon judgments for just compensation?

PARTIES TO THE PROCEEDINGS

The following persons were parties to the appeal in the court below:

> Gordon T. Hoddinott, Donald M. White, and Douglas Littlewood are three former shareholders of Marathon Oil Company and are parties to this proceeding and co-petitioners. Francis A. Armstrong is a former shareholder who also represents over 550 named dissenters and 22 members of a class action. Cede & Co., is a quasi-governmental institution that is jointly owned by the major brokerage firms. Cede actually conducts the trading of most shares held in "street name" by those major houses. Cede has been a nominal party to this litigation only to ensure the inclusion of certain shareholders who held their stock in Marathon in "street name."

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Epstein, Toward a Revitalization of the Contract Clause, 51:3 Univ. Chi. L. Rev. 703 (1984 .... n.15-16

Fama, Random Walks in Stock Market Prices, 21 Fin. Anal. J. 55 (1965) n44; p.21

Fischell, The Appraisal Remedy in Corporate Law, 1983 Am. Bar Found Res. J. 875 .... n.18;n.20

Gordon & Kornhauser, Efficient Markets, Costly Information, and Securities Research, 60 N.Y.U.L. Rev.761 (1985) .... nn.43 & 51

Lattin, Lattin on Corporations 587, 589 (1971 ed.) nn.32,36 &63

Lowenstein, Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation, 1983:2 Col. L. Rev. 249 .... n.50

Merrill, Public Contracts, private Contracts, and the Transformation of the Constitutional Order. 37 CW RES. L.REV. 597, 628 (1987) n.72

Note, Taking Corporate Shares by Right of Eminent Domain, 5 Yale L.J. 205 (1896) .... not cited

Ohio BAR Supp., (Sept. 1928) at 91; n.6

10 Ohio Jur., Corporations, §§ 69, 70 (1930) n.6

38 Ohio Jur. 3d, Eminent Domain §§48, 255 (1982) n.21

Palmer, Obligations of Contracts, Intent and Distortion, 37 CW RES. L.REV 631 (1987). n.71

Rohrer, Ferment in Academia, Institutional Investor (July 1985) at 69 .... n.46

Speech by E.J. Marshall, Amendments to the General Corporation Act, reprinted in Ohio B.A.R. (11/28/38) 498 25

Stein, Where are the shareholders' Yachts? Barrons (8/18/86) at 6 .... n.29

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Wang, Some Arguments that the Stock Market Is not Efficient, 19 U. Cal Davis L. Rev. 341 (1986) n.54

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DECISIONS BELOW

The opinion and judgment of the Supreme Court of the State of Ohio, Armstrong v. Marathon Oil Co., decided September 25, 1987, reported at 32 Ohio St. 3d 397; 513 NE 2d 776, is found in the Appendix, at A-20.

The opinions of the Ohio trial court and appellate court are not reported.

The Opinion and judgment of the United States Court of Appeals for the Sixth Circuit, Radol v. Thomas, decided September 13, 1985, reported at 772 F.2d 244, 54 USLW 2184, Fed Sec.L.Rep. ¶ 92,289 is found in the Appendix at A-73.

STATUTORY PROVISIONS INVOLVED

The Ohio corporate code has a statutory provision for the purpose of providing divested shareholders the right of an appraisal and accounting. These provisions, which were denied to Marathon shareholders, are found in Ohio Revised Code section 1701.85 (rev. 1974), set forth in the Appendix at A-100.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions violated by the unilateral divestiture of Marathon minority shareholders include:

Article I section 10, clause 1 of the United States Constitution, commonly known as the "contract clause," which provides in part:

> "No state shall . . . pass any . . . law impairing the obligation of contracts . . . ."

the "just compensation" clause of the Fifth Amendment:

> ". . . nor shall private property be taken for public use, without just compensation."

the Seventh Amendment , which provides in part:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ..."

and the following two clauses of the Fourteenth Amendment:

> "nor shall any state deprive any person of life liberty, or property, without due process of law . . . "
>
> "nor deny to any person within its jurisdiction the equal protection of the laws."

Also involved in this determination is Ohio's so-called "reserve clause," which purportedly grants the state the unilateral authority to amend corporate contracts or to pass laws empowering others to unilaterally amend corporate contracts. Article XIII section 2 of the Ohio Constitution reads in pertinent part:

> "Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed."

JURISDICTION

Petitioner respectfully request a writ of certiorari to review the judgment of the Supreme Court of Ohio, entered on September 26, 1990, upon appeal from the Ohio Court of Appeals, Third Appellate District, ruling that no substantial constitutional question exists.

The jurisdiction of this court is conferred by 28 U.S.C. §1257 based upon the ruling of the Ohio Supreme Court which construes the Ohio appraisal statute in a manner directly in contradiction to the United States Constitutional provisions concerning the impairment of contracts, the taking of property without just compensation, and due process of law.

STATEMENT OF THE CASE

Early in 1981, the management of Marathon Oil Company recognized that Marathon was selling on the New York Stock exchange at a price

which was significantly below the liquidation value of the company's assets. In order to begin defending itself against the possibility of becoming a target in a hostile takeover bid, the Marathon Board of Directors commissioned a leading oil industry investment banker, First Boston Corporation, to appraise the market value of the company's assets. This appraisal placed Marathon's net asset value at between $188 and $225 per share.[1]

On October 30, Mobil Oil Corporation announced a hostile offer of $85 cash per share for approximately 66% of Marathon stock while proposing to squeeze out the remaining shareholders for debentures worth approximately $75 per share.

Concluding that the $85 price that Mobil was offering was "grossly inadequate," Marathon's Board of Director's immediately authorized (a) the sending of letters to Marathon's shareholders urging them not to tender their shares, (b) the filing of a lawsuit to enjoin the Mobil tender offer, (c) the seeking out of other more acceptable merger partners, and (d) the consideration of "a complete or partial liquidation of the company."

Three weeks later, Marathon found a "white knight" in U.S. Steel. Pursuant to an agreement of merger between the Marathon and U.S. Steel directors, Marathon awarded U.S. Steel an option to purchase ten million shares at $90 per share and a "lock-up option" for the purpose of foreclosing all other bidders for the company.[2] Pursuant to the award of these options, U.S. Steel made an offer to Marathon shareholders to purchase 51% of Marathon stock at $125 per share, while threatening the remainder with being "squeezed-out" in a subsequent merger for U.S. Steel notes worth $76-$85 per share.

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1 An earlier internal appraisal, known as the "Strong Report" valued Marathon's net assets at between $276 and $323 per share. The Ohio Supreme Court ruled these reports immaterial, as a matter of law. The Sixth Circuit, on the other hand, ruled these reports highly material for the purposes of the dissenter's remedy of appraisal. 772 F.2d at 255(A-57).

2 The option would have allowed U.S. Steel to purchase Marathon's Yates oil field for far below market value. The Yates field was, by far and away, Marathon's most valuable asset—its "crown jewel" according to the Sixth Circuit Court in *Mobil v. Marathon*. By awarding U.S. Steel the option to purchase the field at a price below market, Marathon management insured there would be a substantial dilution of share value for any offer other than U.S. Steel. Under Ohio law, the sale of the Yates field alone would have been adequate cause for a shareholder's filing of an action for appraisal of his shares. Ohio Revised Code §1701.76.

On December 23, however, the Sixth Circuit struck down the U.S. Steel options as "manipulative devices" that had, for "all practical purposes completely block[ed], normal healthy market activity and, in fact, could be construed as expressly designed solely for that purpose." *Mobil Corporation v. Marathon Oil Co.*, 669 F.2d 366, 374 (1981).

However, despite the Circuit Court ruling, by the December 4 "pro rata" deadline, U.S. Steel already held 91.4% of the Marathon shares—and the court did not order disgorgement in its December 23 order. To make matters worse for the Marathon shareholders, although Mobil raised the cash portion of its offer to $126 per share, Marathon obtained an antitrust injunction against all Mobil offers. Marathon also rebuffed a tentative private offer of $120 per share, for <u>every</u> Marathon share from Gulf Oil Co.

Between November 30, 1981, the day Mobil announced its offer, and January 6, 1982, the day that U.S. Steel paid for majority control, the share price quoted on the New York Stock Exchange ranged between $64 and $108.[3] On March 10, 1982 the day before the merger vote, the closing price on the New York Stock Exchange was $75.

On March 11, 1982, following the acquisition of majority ownership by the U. S. Steel Corporation, the interests of all shareholders except the U.S. Steel Corporation were retired in exchange for notes valued at approximately $78 per share.[4] Officers and directors, however, were awarded $106 dollars per share for their outstanding stock options.[5]

Petitioners initiated this action in the Common Pleas Court of Hancock County, Ohio to seek as a remedy provided dissenting shareholders an appraisal and accounting of the "fair cash value" of appellants' shares of Marathon Oil Company. The dissenting shareholders' appraisal remedy was enacted pursuant to Ohio and United States constitutional requirements that prohibit the impairment of contracts or expropriation of property without the payment of just compensation.[6]

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3 It is obvious, however, that thirty million shares were traded off of the exchange at $125 per share.

4. U.S. Steel failed to obtain the votes of a majority of the disinterested shareholders.

5 The officers and directors all obtained $125/share by tendering their shares at the commencement of the U.S. Steel tender offer.

6. OHIO REV. CODE § 1701.85. The intent of the Ohio legislation is to allow majority shareholders to make fundamental corporate changes in Ohio corporations, including the elimination of minority shareholders, in a

In 1983 the trial court in this action ruled, as a matter of law, that the stock exchange price was the price to be awarded, but, that because there was no free market on the day before the merger vote, the stock market price two months before the vote was a good estimate of fair cash value. In 1986, the Third District Court of Appeals upheld over twenty assignments of error submitted by all parties to the litigation. Among other things, the Court of Appeals reversed the trial court with regard to its definition of fair cash value, ruling as a matter of law that fair cash value could only be determined by an appraisal of the hypothetical market value of the entire company.

Marathon appealed that decision to the Ohio Supreme Court to rule that fair cash value be limited to market price less depreciation caused by the merger.

Ruling as a matter of judicial notice that all active markets for corporate shares are "efficient," the Supreme Court of Ohio then reversed the appellate court ruling, stating that stock exchange price on the day prior to the merger vote is irrebuttably presumed to be the fair cash value of a share, *as a matter of law,* less appreciation caused by the pending merger. According to the Ohio Supreme Court, wherever there exists active trading, stock exchange price on the day prior to the merger vote constitutes irrebutable evidence of "fair market value of a share" as a matter of law.[7]

The Ohio Supreme Court ruled that trial courts were precluded from admitting any evidence whatsoever regarding the intrinsic, liquidation, going concern, market, or other value of a corporation,[8] and that no

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constitutional fashion. "[A]rticles of incorporation . . . are subject to alteration by less than unanimous consent for the reason that they are *touched with the public interest.* This may constitutionally be done if provision is made for the payment of the fair value of shares or property rights to those who dissent." Ohio BAR Supp., (Sept. 1928) at 91; 10 OHIO JUR. *Corporations,* §70 at 138 nn.5, 6 (1930).

7. Shareholders may bring other actions for harm *separately* from the dissenter's action, but only if that action does not attempt to alter the dissenters' award. Citing *Radol,* the Ohio Court observed that such an action was likely prohibited by *res judicata.* 32 Ohio St. 3d at 422(A-38). Off-exchange trading prices are not admissible as evidence of market price. 32 Ohio St. 3d at 412(A-32). The Ohio court did not attempt to explain how there could have been "active trading" in Marathon shares in December through February if 91.4% of those shares were being held by U.S. Steel.

8 Said the Ohio court: " It is therefore most unreasonable to attempt to value a share of stock held by a dissenting shareholder, utilizing valuation techniques oriented upon inner-corporate functions and property holdings of which the

evidence of fraud, unfairness, breach of duty, or market manipulation was admissible in an action by dissenters pursuant to Revised Code section 1701.85.[9]

The Ohio Supreme Court also ruled that other allegations for injury from fraud or breach of fiduciary duty are maintainable as separate actions only provided that those actions do not attempt to overturn or modify the dissenter's cash award. The court refused to join other causes of action to the appraisal action. [10]

The court further ruled that an appraisal is a "special statutory proceeding" not subject to the constitutional dictates of due process nor requiring a trial by jury. [11]

The Ohio Supreme Court also ruled that the 8% statutory limit on interest was not applicable to this proceeding and the trial judge should award prejudgment interest based upon consideration of various rates of interest over that period of time.

A timely motion for rehearing based upon plain error was denied by the Ohio Supreme Court on November 4, 1987. Specifically, the motion asked the Ohio Court to clarify whether the trial court was to discount the appreciation caused by the merger only or whether the court should also discount the effects of the various tender offers outstanding.

Pursuant to this conclusion of law, the case was remanded to the trial judge to award dissenting shareholders exactly the same amount of money those shareholders would have received had they sold sold their shares on

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shareholder had little if any knowledge at the time he purchased the stock." 32 Ohio St. 3d at 408 (A-18).

9 Provable injury under whatever theory utilized is compensable so long as it does not seek to overturn or modify the fair cash value determined.

10. 32 Ohio St. 3d at 422. The court evidently will not admit evidence of fraud on the market, or any other evidence concerning the health of exchange prices in an appraisal action. The Ohio court did remand the action to the trial court for hearings to adjust the award for and "appreciation or depreciation" of the stock exchange price caused by the merger. Dissenter Price Trust moved for a rehearing based upon the conflict between the use of stock exchange price as irrebutable evidence and the admission of evidence—not including any prices during the tender offer or any evidence of intrinsic value—concerning price appreciation and depreciation.

11 The court evidently reasons that a dissenter's action for appraisal is the legal equivalent of a divorce proceeding, 23 Ohio St. 3d at 420 (A-35), *citing* Belding v. State, ex rel. Heifner, 121 Ohio St. 393 (1929). The Ohio Constitution requires a jury trial for proceedings in eminent domain.

the New York Stock Exchange, not during the course of competitive bidding, but on the day prior to the impending merger vote.

Proceedings on Remand

On October 30, 1987, the trial court conducted a pretrial conference. At the conference the court announced its intention to allow all parties to this action to engage in limited additional discovery and to allow all parties to offer additional evidence (including the testimony of expert witnesses) with respect to the issues to be decided on remand. Following the pretrial, Marathon filed a memorandum urging the trial court to reverse itself and to deny shareholders (including those who, like the Price Trust, were wrongfully denied the right to participate in the original trial) the opportunity to engage in additional discovery or offer additional evidence. In response, shareholders filed (on December 10, 1987) a brief pointing out the procedural and substantive defects in Marathon's reasoning and emphasizing the serious constitutional (both U.S. and Ohio) problems associated with the results sought by Marathon. Nonetheless, the trial court, by Memorandum issued on January 8, 1988 and by a Judgment Entry issued on January 22, 1988, sided with Marathon, reversed its prior ruling and declared that shareholders would not be permitted to engage in any additional discovery, nor offer any additional evidence.

The trial court's Judgment Entry including the following rulings:

> 3. That no additional discovery or additional expert witnesses will be permitted or either Plaintiffs or defendant.
>
> 4. Plaintiffs and Defendant shall deliver to this Court, not later than February 15th, 1988, their memoranda on the issue of what appreciation or depreciation, if any existed on the price of Marathon stock on March 10th, 1982 as a result of the U.S. Steel proposal submitted to Marathon shareholders. No reply briefs or memoranda will be permitted.[12]
>
> 5. On the issue of the rate of interest to be applied by the Court pursuant to the provisions of Section 1701.85 of the Ohio Revised Code, Plaintiffs and Defendant shall submit to this Court, no later than March 1st, 1988 their Memoranda on said issue. No reply Memoranda will be permitted.

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12 By letter dated February 4, 1988, this court changed the February 15, 1988 date to March 1 1988.

On March 18, 1988, the trial court delivered a memorandum decision on the issues of fair cash value and interest to be paid shareholders and followed that memorandum with a judgment entry on April 6, 1988.

Taking the time to first observe that no constitutional provisions were violated by the failure of the court to allow additional evidence and expert testimony,[13] the trial court ruled that the exchange market price of Marathon stock was $75.75 on the day prior to the merger, but the court also found that the price would have been depreciated by the decline of oil company stocks in the prior months absent the merger proposal by U.S. Steel. The court then found that the correct recompense for the expropriation of the investors shares was $68.43 per share. The trial court arrived at this number with no new evidence, despite the observation of Judge Whiteside in the original appellate ruling that neither party had submitted evidence or testimony concerning the appreciation or the market price absent *only* the merger.[14]

In consideration of the Supreme Court's ruling overturning the trial court's award of 8% interest to be paid upon the award of fair cash value, the trial court—considering all of the evidence—ruled that the equitable rate was not 8%, but rather 8.5% simple interest. The trial court awarded this rate of interest, even though not a single published rate of interest averaged below 9% for the past decade and the rate of interest paid upon judgments in Ohio is 10%. The court also discarded the consideration that US Steel financed the merger with notes yielding 18.1% per year.

Petitioners appealed this ruling to the Third District Court of Appeals. Petitioners appealed upon the grounds that the trial court's application of the Ohio appraisal statute was an unconstitutional taking of property because the trial court refused to admit evidence showing full value of the shares. Petitioners also appealed on the grounds that the 8.5% simple

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13 Armstrong v. Marathon Oil Co., No. 82-342-M (C. P. Hancock Co. 3/18/88) (Memorandum) at 4-6; Armstrong v. Marathon Oil Co., No. 82-342-M (C. P. Hancock Co. 4/6/88) (Judgment Entry) at 1.

14 Frances A. Armstrong, et al. v. Marathon Oil Co., (3d App. Dist, Ohio) (January 14, 1986) J. Whiteside. "Although Marathon did present testimony of an expert opinion as to what would have been the stock market price of Marathon stock on March 10, 1982, had there been no tender offer by anyone, or if there had been an unsuccessful tender offer, such evidence was little more than conjecture and, in any event, did not purport to constitute an opinion as to the per-share value of Marathon stock in a sale involving all, or substantially all, of the shares of Marathon stock. Appendix at A-63. For a discussion of the evidence available to the trial court see A-63 to A-65.

prejudgment interest had no basis in evidence, was an abuse of discretion, and violated petitioners right to due process.

The court of appeals ruled that it would not inquire into the thought processes of the trial judge—"the record does not indicate the in depth rationale of the trial court"—but nevertheless ruled that the proceeding was intended to be simple, no new evidence was to be allowed, and that the gross disparity between the amount awarded the dissenters and the amount received by the non dissenters provides no basis for review.

On September 26,1990 the Ohio Supreme Court rejected petitioners' appeal from that order, ruling that no substantial constitutional question was involved. Petitioners respectfully request a Writ of Certiorari to review that judgment.

Related Case

Numerous other lawsuits have been filed with regard to the U.S. Steel acquisition of control and subsequent total acquisition of Marathon. The largest and most comprehensive of those decisions was that of *Radol v. Thomas*, 772 F.2d 244 (1985) involving consolidated shareholder class action claims against Marathon, Marathon directors, and U.S. Steel involving issues of federal securities law and state fiduciary law. The Sixth Circuit ruling in *Radol* denied plaintiffs all claims under federal securities law and granted *summary judgment* for U.S. Steel and Marathon Corporation under state fiduciary laws.

Fundamental to the *Radol* decision was the explicit presumption of the Sixth Circuit that shareholders dissenting from the merger had a full statutory remedy of appraisal and accounting based upon the intrinsic value of the corporation as a whole, and not related to the exchange price for Marathon shares. In so presuming, the Sixth Circuit ruled that:

> [T]he law has given the majority the power to foreclose the ownership rights of the minority and has thereby eliminated the market as a correcting mechanism, *leaving minority shareholders with only the option of dissent and appraisal*. . . .

772 F.2d 244, 255(*emphasis added*).

This fundamental conflict between the positions of the federal Sixth Circuit and the Ohio Supreme Court concerning the interpretation of Ohio law, denies shareholders any and all relief from the expropriation of their shares. Shareholders are faced with a "Catch-22" in which the Sixth Circuit denies them a remedy for fraud or breach of duty based upon the exclusivity of appraisal while the Ohio Court declares that the only remedy

available to shareholders is barred by *res judicata.* This court is the only court that can resolve this conflict between the two highest courts to hear matters regarding the Marathon transaction.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The Court of Appeals ruled tht the stock exchange price as a test for just compensation was not a unique or unconstituional theory of valuation. Armstrong v. Marathon, slip op. (3/29/90) at A-4-5.

The question regarding the violation of due process by the rate of interest was addressed and dismissed by the Court of Appeals at A-6.

The question of whether causes of action surrounding the controversy of a squeezeout merger must be joined or whether the overrulling of a contradictory ruling by a co-equal federal court requires the reinstatement of that action, was raised and decided in the Ohio Supreme Court opinion at A-50.

The question of whether a jury trial is a constitutional right in a dissenters' appraisal proceeding was raised and decided by the Ohio Supreme Court at A-49.

The issue of whether shareholders in a corporation are protected by the equal protection clause of the Fourteenth Amendment was not formally reaised in this proceeding in that form. Shareholders have protested the disparate prices paid for shares at every point in the litigation, but have never asserted the "equal protection" clause. Petitioners want merely to have the value of their shares. Nevertheless, this question is raised as a subsidiary question to the first question of fair cash value, because it it apparent that if corporations are in fact allowed to offer different amounts to different shareholders—if different shares are worth different amounts—then any consideration of the appraisal remedy by this court could be evaded by the states by simply declaring that disparate share treatment is allowable.

REASONS FOR GRANTING THE PETITION

The purpose of the contract clause of the Constitution is to protect the integrity of private contracts.[15] Without the contract clause, government would have unfettered authority to expropriate property and politicians would be unlimited in their ability to reallocate property rights at will.[16]

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15. Epstein, *Toward a Revitalization of the Contract Clause*, 51:3 UNIV. CHI. L. REV. 703 (1984).

16 *See*, Epstein *supra* generally at 713

Without the contracts clause, commercial contracts, business charters, and even property deeds would be meaningless.

Such was the case 170 years ago when the state of New Hampshire attempted to seize the College of Dartmouth through the mechanism of charter revocation. The resulting decision of Chief Justice Marshall in the case of *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819), forms the foundation for all American corporate law.

The *Dartmouth College* ruling that all corporate charters are contracts protected by the Constitution meant that, according to the law of contracts, the dissent of one shareholder was adequate to prevent a fundamental corporate change otherwise supported by the state or all other shareholders. The doctrine was the survivor of so many repeated attacks that sixty years later Chief Justice Waite felt compelled to write that: "The doctrines of *Dartmouth College v. Woodward* ...have become so imbedded in the jurisprudence of the United States as to make them to all intents and purposes a part of the Constitution itself."[17]

For over a century, courts wrestled with the application of the *Dartmouth College* doctrine to problem of fundamental corporate change. To avoid the harsh consequences of the *Dartmouth College* case, states enacted statutes defining remedies for shareholders dissenting from fundamental corporate changes. As more states began to offer appraisal rights to shareholders dissenting from fundamental corporate change, the controversy surrounding the *Dartmouth College* decision reached such a low ebb that one commentator recently noted that it is no longer necessary to debate the constitutional foundations of the appraisal remedy, because the issue is firmly settled and every state has a dissenter's remedy that provides an appraisal and accounting of the intrinsic value of a shareholder's interest.[18]

This case involves the simple application of this well settled constitutional remedy. The facts are clear-cut: shareholders have had their shares taken from them against their will and they are therefore entitled to compensation equal to the value of their shares. That compensation is guaranteed by the contract clause that prohibits impairment of contracts without damages, and the Fifth and Fourteenth Amendments that prohibits the expropriation of property without just compensation and due process of law.

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17 Stone v. Mississippi, 101 U.S. 814, 816(1879).

18. *See* , Fischell, *The Appraisal Remedy in Corporate Law*, 1983 AM. BAR. FOUND. RES. J. 875, 875-80.

The result of this decision is to deny the dissenting shareholders of Marathon corporation any remedy whatsoever for the expropriation of their personal property.

In the recent case of *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1976), this court held that the contract clause has an "important place in our constitutional jurisprudence" and that "its limitation on state power was not illusory." This court's order in *United States Trust* barring the impairment of specific contracts by legislation was closely followed by this court's order in *Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978),which barred the impairment of certain classes of private contracts by legislation. Just as the constitutional contracts clause protects a shareholder from states altering public or private contracts, so too, this court has repeatedly held that the contract clause protects shareholders from divestiture brought about by actions of private parties.[19] It is time for this court to reaffirm the application of the contract clause to private action.

This case involves the simple application of a well-worn remedy. Normally this action would consist of a trial confined to issues of fact. In this case, however, the Supreme Court of Ohio has ruled that no true appraisal shall be granted to the dissenting shareholders of any corporation whose stock is "actively traded."

While the language of the Ohio court is couched in terms of procedure, the *de facto* effect of the ruling is simply to deny shareholders any right of appraisal whatsoever. In the past fifteen years, several state legislatures have flirted with statutes that expressly deny the dissenter's remedy of appraisal for shares listed upon a stock exchange, despite a consensus by the State of Delaware and the American Bar Association to the contrary.[20] Not waiting for the legislature, the Ohio Supreme Court has now acted *sua sponte* to eliminate the dissenter's right of appraisal and accounting of Ohio corporations whose shares are actively traded—whether or not listed on an exchange.

The Ohio Supreme Court went even beyond the simple denial of appraisal, however. The *Armstrong* court ruled that dissenting

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19. *See e.g.* Looker v. Maynard, 179 U.S. 46 (1900).

20 Compare the evolution of this concept during the 1970s: Comment: *A Reconsideration of the Stock Market Exception to the Dissenting Shareholder's Right of Appraisal,* 74 MICH. L. REV. 1023 (1976);Conard, *Amendments of Model Business Corporation Act Affecting Dissenters' Rights*, 33 BUSINESS LAWYER 2587 (1978).

shareholders were not entitled to a full trial, but only a "special proceeding" similar to a divorce hearing.[21] And in this "special proceeding," the trial court was to bear in mind that the minority shareholders were not entitled share equally with the majority shareholders who squeezed them out.[22] Thus, not only does the Ohio Supreme Court deny the shareholders the right of appraisal, but the court sets the merger price[23] as a *ceiling* to any dissenter's remedy. Thus, a shareholder can never dissent at all, because he will always be guaranteed to get less than offered in the merger—no matter how little that might be.

When the trial court applied this test, shareholders were given 10% less money than they would have received had they simply sold their shares the day before the merger—in fact, they received almost 60% less than they would have received had they sold their shares on the exchange three months earlier, or 80% less than if they had tendered to US Steel.

This ruling directly contradicts the rationale upon which the Sixth Circuit relied[24] when denying these same shareholders the right to introduce evidence concerning fraud and breach of fiduciary duty. The contradiction between the Ohio opinion and the Sixth Circuit Court of Appeals ruling in has created a direct and explicit intercourt schism acting to deny shareholders a forum to remedy a forced and fraudulent divestiture. Only this court can eliminate conflicts between rulings of law of the coequal federal Sixth Circuit Court and the Ohio Supreme Court that have left shareholders with no forum to introduce evidence of fraud, unfairness, or any evidence whatsoever regarding the true value of Marathon shares, as a matter of law.

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21 32 Ohio St.3d at 420 (A-38). In Ohio, this distinction is not trivial. The Ohio Constitution guarantees property owners in Ohio the right to a jury trial in a proceeding to determine just compensation for the taking of property. *See*, 38 O. JUR. 3D *Eminent Domain* §255 *et. seq.*

22 32 Ohio St. 3d at 412 (A-23).

23 The merger price and the stock exchange price on the day before the merger will always be equal for shares of Ohio corporations because the Ohio corporate code prohibits arbitrage. Ohio Rev. Code §1701.85(A)(2) (A-68).

24 The denial of the dissenter's remedy of appraisal is in direct opposition to the Sixth Circuit Court of Appeals ruling in *Radol v. Thomas*, that pursuant to this court's ruling in *Santa Fe v. Green*, a corporate shareholder has no remedy for fraud in a squeezeout merger because it is not a market transaction protected by the federal securities laws.

In addition to being in direct contradiction with every Ohio Supreme Court decision since 1857,[25] the Ohio ruling directly attacks this court's exhaustively repeated position regarding the dissenting shareholder's right of appraisal. However, it has been a long time since this court has ruled directly on the dissenter's right of appraisal and the recent advent of the stock exchange exception to the constitutional right of appraisal presents a timely, critical, and controversial issue of constitutional law that is of immediate importance to all shareholders subject to squeezeout mergers in the aftermath of the takeover and "going private" frenzy triggered by the oil takeovers of 1981.

States are in dramatic disagreement over the scope of appraisal. Although Delaware has expanded the amount of evidence allowed in an appraisal action,[26] a few states have moved to eliminate it, either by tying it to the market, or be simple elimination. Presentlly pending before this court is the case of *Virginia Bankshares v. Sandberg*, Case No. 89-1448. In that case, a jury awarded shareholders 50% more money then they would have received in a squeezeout merger. The decision, however, was brought under the federal proxy laws because the State of Virginia has eliminated the appraisal action for shareholders of banks. The question in that case, before this court, is whether there was a lack of causation, with regard to securities fraud, because the majority could have squeezed out the minority without a remedy in any case. If this court wishes to continue the doctine it set forth in Sante Fe v. Green,[27] namely, that the state remedies are the exclusive remedies for a merger, then this court must act to see that those remedies are not unconstitutionally denied or shareholders might be divested of their shares for nothing at all.

In the case of *Dusquesne Light Co. v. Barasch*, 488 US 299, 109 S. Ct. 609 (1989).when evaluating return on investment under the takings clause, this court stated that: "It is not theory, but the impact of the rate order which counts." Nevertheless, this court ruled that: "A state's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times, while denying them the benefit of good investments at others would raise serious constitutional questions." [28]

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25 *See generally* 1 Davies, OHIO CORPORATION LAW §§8623-14,15 & 72 (1942 ed. & 1950 Supp.).

26 Weinberger v. UOP, Inc, 457 A.2d 701 (1983).

27 430 U.S 462 (1977).

28 Slip op at 15.

Efficient market or no efficient market, shareholders today simply have no idea what it is that they own.

The principles of this case are fundamental to United States Constitution. Four separate clauses are violated: the contracts clause, the takings clause of the Fifth Amendment and two clauses of the fourteenth amendment: equal protection and due process. This case involves several thousand shareholders in a multibillion-dollar transaction, but it is dramatically overshadowed by the hundreds of equally large squeezeouts in the years following 1982, whose dissenters' actions are still being litigated.[29]

For 175 years, this court has held that shareholders interests in a corporation are protected by the contract clause, and the Fourteenth Amendment, and Ohio courts may not deny shareholders the full panoply of procedures due them under the Constitution

A corporation forms a three-way contract among a state, a corporation, and its shareholders. That contract is subject to the protection of Article 10 section 1 of the United States Constitution, which prohibits the impairment of contracts. No dissolution, consolidation, or other fundamental change may be made in the charter without unanimous consent of all shareholders. *Dartmouth College v. Woodward,* 17 U.S. (4 Wheat) 518 (1819).

Shareholders are likewise bound by their contract, and majority shareholders may not make use of state authority to merge corporations without unanimous consent of all shareholders. *Clearwater v. Meredith,* 68 U.S. (1 Wall.) 25 (1863); *Lauman v. Lebanon Valley Railroad,* 30 Penn. St. 46 (1858).

The harsh rule of unanimous consent may be ameliorated by a state's reservation of authority to amend corporate charters,[30] but that reservation of authority can never be so broad as to allow the state to affect the fundamental nature of the corporate charter.[31] As stated by this court:

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29 *See e.g.* Stein, *Where are the Shareholders' Yachts?* BARRONS (8/18/86) at 6

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30 Dartmouth College v. Woodward, 17 U.S. (4 Wheat) 518 (1819), Story, J. concurring.

31 It has been argued that pursuant to a reserve clause, states have unlimited authority to alter charters or empower corporations to alter charters under any terms. With the recognition that this would allow legislatures to overturn the contract clause of the Constitution by statute, the overwhelming majority of courts have rejected such assertions with strong language. *See e.g.* Dow v.

> The reserve power is not unlimited and cannot be exerted to defeat the purpose for which the corporate powers were granted, or to take property without compensation, or arbitrarily to make alterations that are inconsistent with the scope and object of the charter or to destroy or impair any vested property right.

Phillips Petroleum v. Jenkins, 297 U.S. 629, 634-435 (1936).

A state's "reserve clause" has been held to enable majority shareholders to do what they could not do at common law: amend a corporate charter without unanimous consent. Pursuant to a state's reserve clause, consent of dissenting shareholders to abide by majority will is implied when an investor purchases corporate stock. But as stated by a preeminent scholar of Ohio corporations: "It is a bit absurd to assume that consent to merge or consolidate carried with it a consent to the obliteration of vested property rights."[32] Thus, in an action by majority shareholders to amend a corporate charter, this court has stated:

> The effect of such a provision, whether contained in an original act of incorporation, or in a constitution or general law, subject to which a charter is accepted, is at the least, to reserve to the legislature the power to make any alteration or amendment of a charter subject to it, which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, the stockholders or creditors, or to promote the due administration of its affairs.

Looker v. Maynard, 179 U.S. 46, 52 (1900).

In situations where minority shareholders dissent to a merger, consolidation or other fundamental corporate change, courts of equity have been willing to allow majority shareholders to proceed only upon an accounting, appraisal, and payment of pro-rata cash value to dissenting shareholders. *Southern Pacific Co. v. Bogert*, 250 U.S. 483 (1919); *Lauman v. Lebanon Valley Railroad*, 30 Penn. St. 46 (1858). In actions

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Northern Railway Co., 67 NH 1, 36 Atl. 510 (1887). In a series of three heated battles between the Ohio and U.S. Supreme Court, it was resolved that the Ohio Constitution could not confer unfettered authority upon the State of Ohio to amend corporate charters. Mechanics' and Traders' Bank v. Debolt, 59 U.S. (18 How.) 380, rev'g. 1 Ohio St. 592 (1855); Dodge v. Woolsey, 59 U.S. (18 How.) 331 (1855); State Bank of Ohio v. Knoop, 57 U.S. (16 How.) 369 (1853).

32. Lattin, LATTIN ON CORPORATIONS, at 582. (1971 ed.).

where the majority has acted pursuant to statutory authority, courts have ruled this to be pursuant to the state's delegation of the power of eminent domain and dissenting shareholders have the right to receive just compensation.[33]

In order to take advantage of these doctrines and provide maximum flexibility to majority shareholders, in 1927, the Ohio Bar Association drafted provisions for the new Ohio Corporate Code that provided the mechanism of appraisal as the remedy for numerous corporate changes. Professor Merrick Dodd who participated in the drafting of this "Model Act"[34] observed the following:

> [I]t is not surprising to find that, although the committee of distinguished lawyers who drafted the present Ohio General Corporation Act have accepted and used as the basis for the act the contractual theory with regard to the nature of the corporation, they have nevertheless deemed it desirable to set forth at considerable length the rules which shall, in the absence of anything to the contrary in the articles, determine the rights and duties of the shareholders among themselves, and have further, largely for the protection of shareholders who may find themselves in the minority, prescribed certain mandatory rules which cannot be varied by anything in the articles—protection of minorities being a matter as to which organizers of corporations are notoriously inclined to be lax.[35]

An investor's shares of a corporation, therefore, constitute a contract among the state, corporation, and other shareholders, and that contract, like any other contract, is protected by the contracts clause, the equal protection clause, and the due process clauses of the United States Constitution.[36] A shareholder dissenting to the divestiture of his shares

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33 Dickinson v. Consolidated Traction Co., 114 Fed. 232 (D. N.J. 1902); Perkins v. New Hampshire Power Co., 90 N.H. 534, 11 A. 2d 811 (1940); Narragansett Elec. Light Co. v. Sabre, 59 R.I. 288, 146 Atl. 777 (1929); Spencer v. Seaboard Air Line R. Co., 137 N.C. 107, 49 S.E. 96 (1904); Black v. Delaware & Raritan Canal Co., 24 N.J. Eq. 455 (1873). *See*, 66 A.L.R. 1553 (1930).

34 "The *Act* is more than a codification of existing law in one state; it reaches into fields where legislators and courts have so far only felt their way; it contains innovations; and it deserves a treatise." Wright, *The New Ohio General Corporation Act*, 75 U.PA. L.REV. 753 (1927).

35 Dodd, *Amendment of Corporate Articles*, 4 U.CIN. L.REV. 129, 132 (1930).

36 Authorities are unanimous on this point. Wheatley v. A.I. Root Co., 147 Ohio St. 127 (1946); Lattin, LATTIN ON CORPORATIONS 587, 589 (1971 ed); 1 Davies,

has the constitutional right of appraisal whether or not provided by statute.[37] The legislature may not abridge that right by statute and state courts must provide the full measure of process due a constitutionally mandated procedure.

The Ohio Supreme Court's opinion contained fundamental errors of constitutional law. First, the Ohio court erred in holding that the rule of unanimous consent for fundamental corporate change is merely a rule of common law.32 Ohio St. 3d at 402 (A-28-29). In fact, the rule of unanimous consent is a rule of constitutional law. Second, the Ohio court erred in holding that the limits of the appraisal remedy were exclusively defined by the legislature and legislative history.[38] In fact, the appraisal remedy is available whether or not provided by statute, and no legislation may limit its application. Finally, pursuant to these initial conclusions, the court ruled that an appraisal action is a "special proceeding" not entitled to the full panoply of process due an action at common law, equity, or even eminent domain.[39]

This court has defined just compensation to mean "the full monetary equivalent of the property taken." *U.S. v. Reynolds*, 397 U.S. 14, 16, (1970). Rulings of law that deny shareholders the opportunity to present evidence regarding "the full monetary equivalent of property taken" violate the strictures of the Fourteenth Amendment. By relegating dissenting shareholders to a "special proceeding" in which they are not allowed to introduce evidence of value, the Ohio Supreme Court has violated fundamental principles of due process.

Contrary to this court's rulings, the Ohio Supreme Court has denied dissenting shareholders due process of law by

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OHIO CORPORATE LAW (1942); Dodd, *Dissenting Stockholders and Amendments to Corporate Charters*, 75 U. OF PA. L. REV. 585 (1927).

37 Southern Pacific Co. v. Bogert, 250 U.S. 483 (1919); Wheatley v. A.I. Root Co., 79 App. 93 (1945), affirmed in part ,147 Ohio St. 127 (1946); Goodisson v. North American Securities Co., 40 Ohio App. 85 (1935); Moy v. Colonial Finance Co., 283 Pa. 323, 129 Atl. 115 (1923)

38 32 Ohio St. at 402 (A-28-299). The great irony of the court's position is that there is no legislative history in Ohio. An even greater irony is that virtually every article cited by the court in support of its position regarding legislative history was written after the 1955 legislation the Ohio court seems to find crucial.

39 In denying plaintiff Harrell the right to a jury trial, the court reasoned that a dissenter's action for appraisal is the legal equivalent of a divorce proceeding, 23 Ohio St. 3d at 420 (A-55), *citing* Belding v. State, ex rel. Heifner, 121 Ohio St. 393 (1929). The Ohio Constitution requires a jury trial for proceedings in eminent domain.

denying them the right to introduce evidence and present a case.

"In order to conform to the requirement of due process of laws, rules of evidence must be reasonable and provide an opportunity to present a case." *Crowell v. Benson* , 285 U.S. 22. This court has recognized that when the rules of evidence can have the effect of denying access to a remedy, those rules must be struck down as contradicting the requirements of due process.

Without entertaining argument of the parties, the Ohio Supreme Court ruled as a matter of law that shares traded on a major stock exchange are perfectly valued and therefore it is not necessary for the court to inquire as to the value of the corporation as a whole. 32 Ohio St. 3d at 408-413 (A-17-25). On remand, the trial court ordered that the parties were prohibited from introducing further evidence and were prohibited from full briefing of the remaining issues.[40] This was so even though there was not one witness who testified with regard to the "appreciation or depreciation caused by only the merger.[41]

The Ohio Supreme Court violated evidentiary standards of due process by creating an irrebutable presumption of evidence that fair cash value equals stock exchange price.

Without any legal precedent whatsoever, the Ohio Supreme Court ruled as a matter of judicial notice that active trading in a stock creates an irrebutable presumption of value in a dissenter's action for appraisal.[42] As the foundation for this judicial notice the court cites a series of articles from economic journals dating from 1963 to 1974. These articles discuss a theory of economic science born in the mid-1960s that has become known as the "Efficient Market" or "Random Walk" Hypothesis. These articles cited by the court constitute several of a huge library of economic literature delving into the issues of efficiency in the financial markets.[43]

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40 Armstrong v. Marathon,Oil Co., Memorandum Order (C.P. Hancock Co.1/8/88) Walker, J.

41 *See* note 14, *supra*

42. These articles were not the subject of any discussion or debate by the parties to the action before the Ohio court. The articles are evidently the discovery of independent research by the Ohio court.

43 As observed by one author, only legal scholars think that the market is efficient. Gordon & Kornhauser, *Efficient Markets, Costly Information, and Securities Research,* 60 N.Y.U.L. REV.761 (1985).

The creation of the modern efficient market hypothesis (EMH) is generally traced to an article by Eugene Fama in 1965.[44] The theory has three formulations and three classes of adherents: the strong form, the semi-strong form, and the weak form. The strong form of the theory holds that market prices approximate the true intrinsic value of all stocks traded upon the New York Stock Exchange.[45] The semi-strong form postulates that stock prices *reflect* all *public* information available concerning share value. The weak form postulates that most of the time, most stock prices will reflect a "best guess" regarding true stock values for the small individual investor.

In the twenty-two years since the theory was originally proposed, academic reaction to the theory has come around full circle from nacent enthusiasm to aged skepticism. Recent research and literature has almost completely debunked the EMH. Not one leading economist today subscribes to the strong form of the hypothesis and even its most ardent supporters are abandoning the semi-strong form. Others have already abandoned the weak form. As stated by Harvard Economist Lawrence Summers, adherence to the hypothesis itself "represents a fad, a 'shared act of faith.'"[46] Says Yale economist Robert Schiller: the efficient market hypothesis "may be one of the most remarkable errors in the history of economic thought."[47]

The use irrebutable or conclusive presumptions violates constitutional standards of evidence.[48] The Fourteenth Amendment requires that no conclusive presumptions may be adopted by a court or legislature that would givean artificial and evidentiary force to certain facts which otherwise would be wholly irrelevant and inconclusive.[49] It could hardly be said that either a "fad" or "one of the most remarkable errors in the history of economic thought" would meet this standard.

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44 Fama, *Random Walks in Stock Market Prices*, 21 FIN. ANALYSTS J. 55, 56 (1965)

45 No economist has ever proposed that any other exchange is efficiently priced.

46. Rohrer, *Ferment in Academia*, INSTITUTIONAL INVESTOR, (July 1985) at 69 .

47 Id. at 70.

48 *See eg. Request of the Senate No. 89-050,* Supreme Court of New Hampshire, Opinion3/10/89) in which the court rules that conclusive presumptions regarding highest and best use are unconstitutional.

49 *See, 29* AM JUR, 2D *Evidence*, §11, *et. seq.*

The use of stock market prices as a measure of just compensation is irrational, arbitrary, and unconscionable for four reasons:

1. Even if the strong form of the hypothesis were valid, it could not be valid in the context of a two-tier tender offer or a freezeout merger. According to Fama, the intrinsic value of a stock is based upon the discounted present value of its potential payout. One of the most substantial factors of that intrinsic value is the potential payout upon a merger or appraisal. As noted by professors Fischell and Lowenstein, appraisal of the intrinsic value of a corporation is the sole solution to the "prisoners dilemma" faced by a shareholder in a two tier squeezeout takeover.[50]

2.Even if the semi-strong form of the theory holds, that standard does not meet the standards of due process. "Disagreement among Market participants . . . *will give rise to discrepancies between actual [market] prices and intrinsic values."* Fama, *Random Walks in Stock Market Prices*, 21 Fin. Analysts J. 55, 56 (1965)(emphasis added). It is necessary to understand that to an economist, market efficiency merely means that the market participants are engaged in a "fair game."[51] The "fair game" says that even though the stock price is not right, it is as likely to be too high as too low. Americans, however, do not walk into courtrooms for the purpose of rolling dice. As stated by Justice Stewart in *Faretta v. California:* "[p]ersonal liberties are not rooted in the law of averages." 422 U.S. 806 (1975).

3.Furthermore, this "fair game" becomes less fair when management or a controlling shareholder decides to acquire the entire company.[52]

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50 Fischell, *The Appraisal Remedy in Corporate Law,* 1983 AM. BAR FOUND. RES. J. 875, 885. Lowenstein, *Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation,* 83:2 COL. L. REV. 249, 307-309 (Mar. 1983). *See also:* Stout, *The Unimportance of Being Efficient: An Economic Analysis or Stock Market Pricing and Securities Regulation,* 87 MICH L. REV. 613 (1988).

51 *See,* Id.; Gordon & Kornhauser, *Efficient Markets, Costly Information, and Securities Research,* 60 N.Y.U.L. REV.761 (1985).

52 The Ohio corporate code denies appraisal for shares traded pending a merger. Thus, during the pendency of a merger, the "stock exchange price" must always float to the value of the compensation offered in a merger. Using the exchange price to determine appraisal denies the shareholders any value other than that offered in the merger.

Were management allowed to squeeze out shareholders at market price, management would be rewarded for driving down the price of the stock.[53]

4.Finally, as a factual matter, the market simply is not efficient even in a weak sense. Numerous studies of market efficiency over the past ten years have thoroughly documented the inefficiencies of the market.[54] It is no accident that the Ohio court cited no economic journals of the past thirteen years. The literature supporting its finding of fact by judicial notice that it has applied to this case as a matter of law, is simply not supportable by modern economic science.[55]

The direct contradictions of the rulings of the Ohio Supreme Court and the Sixth Circuit Court of Appeals combined to deny Marathon shareholders a forum in which to present evidence and obtain just compensation for the expropriation of their property.

Following this court's lead in *Santa Fe v. Green*, 430 U.S. 462 (1977) the Sixth Circuit Court of Appeals, in the action *Radol v. Thomas*, 772 F. 2d 244 (1985), denied Marathon shareholders actions at both federal *and* state law for fraud, manipulation, coercion, and directors' breach of fiduciary duty. The Sixth Circuit ruled that the tender offer of U.S. Steel, which preceded the squeezeout, was an entirely separate transaction from the proxy solicitation and squeezeout that followed and that it was not necessary to inquire concerning fraud in a merger because of the existence of a state appraisal remedy. The *Radol* court also ruled that the Marathon directors were protected from liability by the business

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53 In the aftermath of the astounding Marathon takeover, management-led leveraged buyouts have become immensely popular.

54 An overview and explanation of the large body of recent literature debunking the Efficient Market Hypothesis is given in Wang, *Some Arguments that the Stock Market Is not Efficient,* 19 U. CAL DAVIS L. REV. 341 (1986).

55 Ten years ago the ABA reversed its position on this point saying: "The former exception for shares listed on stock exchanges has been eliminated in the light of facts which have become more visible since the stock market exception was added to the Model Act in 1969. The 1970s have demonstrated again the possibility of a demoralized market in which fair prices are not available, and in which many companies publicly offer to buy their own shares because the market grossly undervalues them. Under these circumstances, access to market value is not a reasonable alternative for a dissenting shareholder. . . . In any event, the market cannot reflect the value of the shares 'excluding any appreciation or depreciation in anticipation' of the corporate change which gives rise to the dissenters' rights." Conard, *Amendments of Model Business Corporation Act Affecting Dissenters' Rights*, 33 BUS. LAW. 2587, 2596 (1978)

judgment rule, 772 F.2d at 255 *et seq.* (A-59-62), and the court ruled that the Marathon corporation, *qua* corporation, could never be liable for breach of fiduciary duty toward its shareholders, because the corporation has no fiduciary duty. 772 F.2d at 258 (A-63).[56] Finally, the *Radol* court confirmed the trial court's summary judgment in favor of U.S. Steel with regard to matters of fiduciary duties, ruling that there are no fiduciary duties owed to shareholders during a squeezeout.

The essence of the *Radol* opinion is that the tender offer and subsequent squeezeout merger were separate transactions with a single remedy—appraisal.[57] The essence of the *Armstrong* opinion was that these were one unitary transaction with one remedy—breach of fiduciary duty.[58] The Sixth Circuit held that the shareholders could not avail themselves of the proxy laws in the first stage as a remedy for the second stage, while the Ohio Supreme Court ruled that the appraisal remedies of the second stage would be based upon the market in the first stage. The Sixth Circuit denied a remedy for breach of duty based upon the availability of an accounting and appraisal, while the Ohio Supreme Court denied an accounting and appraisal based upon the availability of a separate action for breach of duty. But the the Ohio Court ruled the separate remedy unavailable by way of *res judicata*.

Thus, in federal court, the shareholders are denied an action for fraud during the acquisition of control because there has yet to be a squeezeout. They are denied an action for fraud in the squeezeout because they have no discretion. Finally, they are denied an action for coercion, manipulation, and breach of fiduciary duty because there was no fraud.

However, by limiting the dissenter's recompense to market price, the Ohio Supreme Court has relegated the dissenter to the vicissitudes of a

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56. Observing that cases dealing with corporate fiduciary duties all concerned corporations acting as majority shareholders, the *Radol* court nevertheless failed to address the issues of fiduciary duties owed by U.S. Steel.

57 It is not clear how the Sixth Circuit dealt with the issue of the disparity of price between the cash-out price provided the officer and directors and that provided the shareholders. Marathon justifies the $20 per share premium paid to officers as being the "blended price" achieved by "blending" the takeover price with the squeezeout price in a unitary transaction. If the Sixth Circuit is to be taken at its word concerning the separate nature of the two transactions, at the very least, the directors have a fiduciary duty to ratably share the proceeds of the merger.

58 Although the Ohio court viewed the transaction as a unitary transaction 32 Ohio St. 3d at 412 note 19 (A-21), the court still refused to allow minority shareholders participation in the "control premium."

defrauded and manipulated market.[59] Shareholders are whipsawed between two courts playing hot potato with their claims.

This unreconcilable schism has developed because the federal courts have ruled the markets in squeezeouts to be inherently "inefficient" while on the other hand, the Ohio Supreme Court has held that all trading on a national exchange is efficient as a matter of law.[60] The Sixth Circuit ruled that:

> the law has given the majority the power to foreclose the ownership rights of the minority and has thereby eliminated the market as a correcting mechanism, leaving minority shareholders with only the option of dissent and appraisal.

772 F.2d at 255 (A-57).

In turn, however, the Ohio Supreme Court has ruled that investors buy and sell stock on the federally regulated exchanges, wholly without concern or reference to the internal affairs of the corporation. Said the Ohio court:

> It is therefore most unreasonable to attempt to value a share of stock, held by a dissenting shareholder, utilizing valuation techniques oriented upon inner-corporate functions and property holdings of which the shareholder had little if any knowledge at the time he purchased the stock."

32 Ohio St. 3d at 408 (A-18).[61]

The Ohio Court goes on to state that:

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59 Note that the Ohio Supreme Court denied any other methods for determining value in a dissenter's action. The court states: "the statutory proceeding under R.C. 1701.85 is the sole means for determining the value of a dissenter's shares. . ." 32 Ohio St. 3d at 422 (A-38).

60 In this regard the Ohio court, *sua sponte,* by judicial notice, overturned the trial court's finding of fact that the exchange price of Marathon at the time of the merger was inherently not the subject of a free market.

61 The Ohio court evidently views the dissenter's right as some sort of vindication of the dissenter's righteousness in dissenting. Yet the court ruled that *no evidence of value may be admitted in court* to show the true value of shares apart from market value. The court states that *as a matter of law* internal and confidential information is "largely unknown to the shareholder at the time he purchased his stock. Consequently, it formed little or no part of his decision to purchase the stock or indeed, to dissent from the tender offer and merger." 32 Ohio St. 3d at 409 (A-18).

[T]he owner of shares of a company listed on a national securities exchange *regards himself as an investor in those securities, rather than as a part of the corporate enterprise. . . .Since the measurement of these objectives is provided by the exchanges* . . . dissent and appraisal no longer [should be] required.[62] (*emphasis in original).*

This fundamental conflict with regard to the interpretation of corporate law has left shareholders with no discretion and no remedy in a multistage transaction by which they are forcibly divested of shares.

This court has repeatedly held that shareholders are entitled to the ratable benefits of the corporation as their interest appears, and it is a violation of the Equal Protection Clause of the United States Constitution for the Ohio Supreme Court to hold as a matter of law that controlling shareholders and officers are entitled to greater profits than minority shareholders similarly situated under the law.

Equality of shareholders is the polestar of corporate law.[63] A "share" of an Ohio Corporation is a contractual ownership of a pro rata portion of that corporation; all powers granted to a corporation are exercisable only for the ratable benefit of all shareholders. "In determining the rights of shareholders as between themselves, we go back to the principle of partnership law and the rule that unless otherwise expressly specified all shares are equal." Speech by E.J. Marshall, *Amendments to the General Corporation Act*, reprinted in Ohio BAR (11/28/38) at 498. Stockholders of the same class are entitled to the same treatment.[64]

Adolf Berle, this century's leading corporate scholar has stated:

[A]ll powers granted to a corporation or to the management of a corporation or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all shareholders as their interest appears.

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62. 32 Ohio St. 3d at 408 (A-18), quoting, Note, *A Reconsideration of the Stock Market Exception to the Dissenting Shareholder's Right of Appraisal,* 74 MICH. L. REV. 1023, 1024 fn. 4 (1976).

63 *See e.g.* Lattin, LATTIN ON CORPORATIONS, 587, 589 (1971 ed.); Brudney and Chirelstein, *Fair Shares in Mergers and Takeovers,* 88 HARV. L. REV. 297, 330, 340 (1974).

64 Brudney, *A Note on Going Private,* 61 VA. L. REV. 1019, 1022 n.12 (1975)

Berle, *Corporate Powers as Powers in Trust*, 44 Harv. L. Rev.1049, 1049 (1931).

Nowhere is the concept of equality more exposed than in a corporate squeeze-out such as occurred in this case. In *Southern Pacific Co. v. Bogert*, 250 U.S. 483 (1919), Justice Brandeis declared:

> The essential of the liability to account sought to be enforced in this suit lies not in the fraud or mismanagement, but in the fact that, having become a fiduciary through taking control of the Old Houston Company, the Southern Pacific has secured fruits which it has not shared with the minority. The wrong lay not in acquiring the stock, but in refusing to make a pro rata distribution on equal terms among the Old Houston Company shareholders. . . . The duty of the majority shareholder to make pro rata distribution of the fruits of its control on equal terms among the minority is fiduciary and not dependent upon fraud or mismanagement.

Id. at 492. It is fundamental to the operation of corporate law that management not be allowed to "repudiate any part of the contract through which it had secured a part of its capital." *Wildermuth v. Lorain Coal & Dock Co.*, 138 Ohio St. 5, 19 (1941).

The Ohio court states that the appraisal remedy seeks to determine not the fair cash value of the corporation but the fair cash value of a share of stock. Ruling that an investor "regards himself as an investor in those securities rather than as a part of the corporate enterprise," [65] the Ohio Supreme Court overruled the Ohio appellate ruling that the value of a share was equal to the value of a pro rata portion of the firm. To say that a "share" is a "piece of paper" is to read into the corporate code what the legislature refused to put in it: a limitation upon the "share" concept.[66]

Stating that prices paid by U.S. Steel to obtain control of the corporation were "premium prices to obtain control," the Ohio Supreme Court ruled that this premium "is not properly includable in determining the market value of the shares of stock." 32 Ohio St. 3d at 412 (A-23).[67]

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65 23 Ohio St. 3d at 408 (A-18).

66 "Share" is not defined in the Ohio corporate code.

67 The Ohio Supreme Court never discusses how there could have been active trading of Marathon shares on the exchange while U.S. Steel held 91% of the shares in escrow. Nor does the court explain why those trades should be considered by the court while the vast majority of the shares were being traded between U.S. Steel and the tendering Marathon shareholders.

The Ohio court refused to deal with the absolute disparity between the $125 offered for the stock owned by the officers and directors, the $106 for their option and warrants, and the $76 offered to the remaining minority shareholders.

Much more importantly, however, by denying the shareholders the right to pro rata participation in the wealth of the firm, the Ohio Supreme Court relegates minority shareholders to second-class citizenry. The Ohio Court empowers U.S. Steel to expropriate the entire wealth of the corporation and take a "control premium" all to itself without the requirement of equal participation of all shareholders.

This fundamental disparity of treatment among shareholders who all own the same shares pursuant to the same Ohio law, is the essence of what the equal protection clause of the Fourteenth Amendment was intended to prevent. It has long been apparent that government and powerful private interests can conspire to deprive the less powerful of property, the enforcement of contracts, and other privileges enjoyed by the powerful. With every modern case under the equal protection clause, this court has recognized that persons similarly situated under the law are entitled to equal treatment under the law. It is therefore fundamentally unconstitutional to say that "controlling" shareholders own corporate wealth, while minority shareholders merely own pieces of paper. And it goes without saying that in one transaction a corporation cannot pay one shareholder one share price and another shareholder another price.

Shareholders dissenting to a merger are entitled to a jury trial of appraisal because the appraisal remedy is a lesser remedy substituted for a greater remedy that existed at common law.

The repeated request for a jury trial in this case was denied by the Ohio Supreme Court. The court stated that the constitutional right to a jury trial applies only where trial by jury existed at common law. Although the Ohio Constitution provides for a jury trial for a "taking" by eminent domain or the collection of an ordinary debt, the Ohio Supreme Court chose instead to compare the dissenters' remedy to a claim for child support. Thus the Ohio Court ruled that this was a "special proceeding" "most similar to those kinds of proceedings which were exempt [from jury trials] at common law."

While it is true that the appraisal remedy did not exist at common law, it is also true that the appraisal remedy is a remedy that the legislature has

substituted for the greater remedy that previously exsited—namely, the right to enjoin the merger altogether.

It is quite apparent that if the legislature can substitute "special proceedings" for common law remedies, then the legislature can also deny the Constitutional right to a jury trial in any action it chooses to do so. In other words, if this case stands, a state legislature could overrule the Constitution by creating statutory "special proceedings" whereever it sought "judicial efficiency."

If a shareholder opposing a merger has a right to a jury trial at common law, and if the contract clause protects his right to that contract, then the legislature should not be allowed to eliminate his rights by redefining his remedies.

This court should rule that the due process clause of the Fourteenth Amendment mandates the payment of equitable prejudgment interest upon any judgment order enforcing a previously existing obligation.

In a dissenter's action for the appraisal of shares in Ohio, the dissenting shareholders are obligated to turn in their share certificates for leganding and forego any payments made to other shareholders in the merger. In this case, US Steel, now USX, issued notes with a primcipal amount of $100 per share paying a nominal interest rate of 12%, or an actual rate of 17.28% compounded semiannually, for an annual yield of 18%.[68] Although Ohio law provides for the payment of interest during the pendency of the appraisal, the shareholder surrenders the use of his money to the corporation during that time—six and a half years in this case. The appraisal statute also provides for the payment of interest upon the award of fair cash value.

In his first judgment in 1983, the trial judge awarded 8% simple interest to be paid upon the fair cash value of the shares. This award was based upon the statutory rates for usury in Ohio at the time of the merger.

The Ohio Supreme Court rejected this award and ruled that the Ohio statutory rate for interest upon judgments was not controlling and the proper amount would be a rate of interest based upon "various kinds of loans, the average prime rate over that period of time and any other such evidence."

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68 The actual rate of interest is based upon the discounting of actual market price of the notes, which was approximately $76 per $100 of principle.

On remand, the trial court ruled that 8.5% simple interest would suffice for prejudgment interest. This was despite the fact that Ohio statutory rate for judgments is now 10%. This was despite the fact that US Steel financed the merger with notes yielding 18% interest per year. This was despite the fact that even the average rate of interest for 60 day GMAC commercial paper was well over 9% for the period.

Had this ruling been made in federal court, the interest award would have constituted an abuse of discretion.[69] In fact, had this ruling been made in any normal forum, the interest award would have been inadequate.

Although interest awards on judgments were not necessarily favored in early common law, modern courts and legislatures have virtually unanimously provided for prejudgment interest upon previously outstanding obligations. Only because the Ohio Supreme Court has declared this to be a "special proceeding" does the trial court now obtain the discretion to deny a reasonable rate of interest.

This Court has never ruled that due process requires the payment of prejudgment interest, yet it is obvious that the denial of prejudgment interest on outstanding obligations essentially eliminates the appraisal remedy in Ohio. This court has already recognized the constitutional imperative for paying a reasonable return for equity investments in utility rate takings cases.[70] It is now time for this court to establish this accepted doctrine as a pillar of due process or states can evade payments in other "taking" cases by delaying the judgment and awarding no interest.

CONCLUSION

One recent commentator has noted that it may be socially acceptable to relax the contract clause, but it is not good constitutional doctrine.[71]

Dismissal of this appeal would signify that shareholders have no protection from the expropriation of their shares. It would provide present corporate managers the opportunity to acquire all corporate wealth in the

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69 See e.g., Ford v. Alfaro, 785 F.2d 835 (1986); Todd Shipyards v. Turbine Service, 674 F.2d 401 (1982).

70 "Return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks." Duquesne Light co. v. Barasch, *supra.* at 14, citing Federal Power Comm'n v. Hope natural Gas Company, 320 U.S. 591 (1944).

71 Palmer, *Obligations of Contracts, Intent and Distortion*, 37 CW RES. L.REV 631 (1987).

country and destroy the corporation as useful form of business organization.

Writing about the contracts clause in *The Federalist* James Madison observed:

> ·The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators. . .[72]

The shareholders in this action have been done a grave injustice, but this case is only one of the first of the great takeover and going private wave of the 1980s. Because few of those cases will ever survive the gamut of appraisal litigation to reach this court, this case provides a unique opportunity for this court to reaffirm a constitutional basis for corporate wealth, while at the same time, assuring American investors that there is a solid foundation to their investments.

Respectfully submitted,

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December, 1990

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[72] The Federalist No. 44 at 282-83. cited in Merrill, *Public Contracts, private Contracts, and the Transformation of the Constitutional Order*, 37 CW RES. L.REV. 597, 628 (1987).

(2)

90-1095

CASE NO.

In The Supreme Court of the United States

OCTOBER TERM 1990

FRANCES A. ARMSTRONG, *et al.*
Petitioners

v.

MARATHON OIL COMPANY
Respondent

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI

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FRANCIS A. ARMSTRONG, PLAINTIFF-APPELLANT, v.
MARATHON OIL COMPANY, DEFENDANT-APPELLEE.
CEDE & CO., PLAINTIFF-APPELLANT, v.
MARATHON OIL COMPANY, DEFENDANT-APPELLEE.
GORDON HODDINOTT, PLAINTIFF-APPELLANT, v.
MARATHON OIL COMPANY, DEFENDANT-APPELLEE.
DOUGLAS B. LITTLEWOOD, PLAINTIFF-APPELLANT, v.
MARATHON OIL COMPANY, DEFENDANT-APPELLEE.
DONALD M. WHITE, PLAINTIFF-APPELLANT, v.
MARATHON OIL COMPANY, DEFENDANT-APPELLEE
Case Nos. 5-88-11, 5-88-12, 5-88-13, 5-88-14, 5-88-15;
Court of Appeals of Ohio,
Third Appellate District,
Hancock County
Slip Opinion
Date of Judgment entries: March 29, 1990
CHARACTER OF PROCEEDINGS: Civil Appeals from Common Pleas Court.
JUDGMENTS: Judgments affirmed.

EVANS, J. These cases are appealed from judgments of the Court of Common Pleas of Hancock County regarding the fair cash value and interest thereon to be paid to the shareholders of the Marathon Oil Company (Marathon) dissenting from the 1982 merger of Marathon and the United States Steel Corporation(USX).

Appellants, Francis A. Armstrong, et al., initiated this action in 1983 inthe Court of Common Pleas of Hancock County to pursue the appraisal remedy provided for shareholders dissenting from a fundamental corporate change (e.g.merger) by R.C. 1701.85. The trial court found that the stock market price quotation two (2) months prior to the vote approving the proposed merger was the controlling estimate of fair cash value. Both Marathon and Armstrong appealed the decision to the Ohio Supreme Court.

In Armstrong v. Marathon (1987), 32 Ohio St. 3d 397, (paragraphs two and three of the syllabus), the Ohio Supreme Court considered the proper method of computation of fair cash value and found as follows:

> "2. Where facts presented to the trial court evidence a reasonably suitable,active market of the particular corporate stock under consideration, and the actual market may be deemed to be sufficiently active in the trading of such stock, then the trial court

should give substantial weight to such evidence.This actual market price would satisfy the willing seller-willing buyer test set forth in R.C. 1701.85, and would be the 'fair cash value' of such stock.

"3. If such active market trading of the stock in question is so found, the fair cash value is properly measured pursuant to R.C. 1701.85(C) as the stock market price of the shares as of the day prior to that on which the shareholders' vote on the corporate transaction was taken excluding any appreciation or depreciation in this price resulting from the proposal submitted to the shareholders."

The Ohio Supreme Court further considered the proper computation of interest payable on such fair cash value in Armstrong, supra, (paragraph five of the syllabus), as follows:

"5. Insofar as R.C. 1701.85 sets forth a 'special proceeding within the meaning of section 2505.02 of the Revised Code,' and provides for an interest rate based upon all equitable considerations, then the statutory rate set forth in R.C.1343.01(A) is not controlling. The rate should be determined from the written evidence submitted by the parties upon this issue."

Pursuant to these findings the Ohio Supreme Court remanded the cause to the Court of Common Pleas of Hancock County for the resolution of two (2) narrow issues. The trial court was to determine, first, "what appreciation or depreciation, if any, existed due to the U.S. Steel proposal submitted to the Marathon shareholders" and, second, "what rate of interest, given various factors not limited by R.C. 1343.01(A), shall in the court's discretion be awarded the dissenting shareholders." Marathon filed a motion for rehearing which was denied on November 4, 1987.By judgment entry filed January 22, 1988, the trial court declared that the shareholders would not be permitted to engage in further discovery nor introduce additional expert testimony. Rather, the trial court permitted only the submission of briefs on the relevant issues with no reply briefs permitted.

On March 18, 1988, the trial court rendered its decision finding that the market price of Marathon stock on the day prior to the approval of the merger was \$ 75.75. The court then adjusted this sum to \$ 68.43 to compensate for the appreciation of the stock resulting from the proposed merger. In regards to the rate of interest to be awarded the trial court found 8.5% to be equitable.

It is from this judgment that appellants appeal submitting nine (9) assignments of error. Being substantially related, assignments of error one (1),two (2) and four (4) will be consolidated for review.

"I. THE COMMON PLEAS COURT DENIED SHAREHOLDERS DUE PROCESS OF LAW BY DENYING THE SHAREHOLDERS THE RIGHT TO INTRODUCE EXPERT TESTIMONY UPON THE ECONOMIC THEORIES OF THE OHIO SUPREME COURT.

"II. THE COMMON PLEAS COURT · DENIED SHAREHOLDERS DUE PROCESS OF LAW BY DENYINGTHE SHAREHOLDERS THE RIGHT TO PRESENT FULL ARGUMENTS AND REPLY BRIEFS ONTHE ISSUE OF FAIR CASH VALUE.

"III [sic] THE COMMON PLEAS COURT DENIED SHAREHOLDERS DUE PROCESS OF LAW BYINTERPRETING THE OHIO SUPREME COURT'S DECISION IN DIRECT CONTRADICTION TOARTICLE I SECTION 19 OF THE OHIO CONSTITUTION AND ARTICLE I SECTION 10 OF THEUNITED STATES CONSTITUTION PROHIBITING THE IMPAIRMENT OF CONTRACTS AS WELL ASARTICLE II SECTION 28 OF THE OHIO CONSTITUTION AND THE FOURTEENTH AMENDMENT OFTHE UNITED STATES CONSTITUTION PROHIBITING THE TAKING OF PROPERTY WITHOUT DUEPROCESS OF LAW."

Appellants go to great lengths to demonstrate that "[b]ecause the 'contract clause' and the 'just compensation clause' of the Constitution mandate that the state provide an appraisal remedy for dissenting shareholders, that appraisal standard must be interpreted so as to be within the Constitution".Appellants contend, therefore, that the trial court's refusal to allow further evidentiary hearings for the introduction of expert testimony and reply briefs constituted a deprivation of their constitutional rights of confrontation,cross-examination and due process.

R.C. 1701.85(C) was promulgated to provide an accurate definition of fair cash value and to guide Ohio courts in the computation of such. R.C.1701.85(C) reads as follows:

> "(C) If the proposal was required to be submitted to the shareholders of the corporation, fair cash value as to those shareholders shall be determined as of the day prior to that one which the vote by the shareholders was taken, and, in the case of a merger pursuant to section 1701.80 or 1701.801 of the Revised Code, fair cash value as to shareholders of a constituent subsidiary corporation shall be determined as of the day before the adoption of the agreement of merger by the directors of the

particular subsidiary corporation. The fair cash value of a share for the purposes of this section is the amount that a willing seller,under no compulsion to sell, would be willing to accept, and that a willing buyer, under no compulsion to purchase, would be willing to pay, but in no event shall the fair cash value exceed the amount specified in the demand of the particular shareholder. <u>In computing such fair cash value, any appreciation or depreciation in market value resulting from the proposal submitted to the directors or to the shareholders shall be excluded.</u>" (Emphasis added.)

Therefore, the issue of what appreciation or depreciation the stock incurred as a result of the proposed merger was properly before the trial court in the initial proceeding which, as noted by the Ohio Supreme Court in Armstrong, supra, at 401, was "[a] full hearing on the issue of fair cash value,consisting of approximately three weeks of trial, * * * ". Accordingly, being a statutory element utilized in computing fair cash value, appellants had not only opportunity, but a responsibility to introduce expert testimony pertaining to the appreciation or depreciation in Marathon stock as a result of the proposed merger in the initial trial.

In light of this, appellants, in support of their second assignment of error,contend that given the Ohio Supreme Court's adoption of various complicated economic theories unique to the computation of fair market value, expert testimony was required to properly address the newly formulated issues.Appellants argue that the trial court's refusal to permit additional testimony or reply briefs constituted a deprivation of their constitutional rights of confrontation, cross-examination and due process.

Upon review of Justice Holmes' opinion in *Armstrong, supra*, we are unable to discern the advancement of any unique economic theory or interpretation of R.C.1701.85 by the Supreme Court. Quite the contrary, the Ohio Supreme Court cites both *Vought v. Republic-Franklin Ins. Co.* (1962), 117 Ohio App. 389; and *Parten v. Pure Oil Co.* (July 1, 1969), Franklin App. No. 9023, unreported, in interpreting R.C. 1701.85. The court adopted nothing new but rather reaffirmed and consolidated the existing case law and statutory language.

We agree, as argued by appellants, that the Supreme Court cites numerous academic articles in its opinion. However, these were not utilized with the intent of incorporating them into the computation of fair cash value, rather they were offered to aid in the explanation of the views maintained by other jurisdictions and as rationale for the less complicated valuation proceedings set forth in Vought, Parten and R.C. 1701.85. For example, the "efficient market theory" is offered only as rationale for the

conclusion that the stock market quotation the day prior to the vote for the proposed merger is an accurate and desirable initial value from which to compute fair cash value. See, *Armstrong*, *supra*, at 410. Another example cited by appellants is the"hypothetical market value" computation. However, this theory was already embedded in Ohio law by statutory mandate in the "willing seller-willing buyer"test found in R.C. 1701.85. See, Armstrong, supra, at 408.

We note also that the Ohio Supreme Court in Armstrong, supra, at 419, made it quite clear in their opinion that " * * * the issues, pursuant to our determination of the first (valuation) issue above, have been considerably narrowed, and are resolvable without recourse to further evidentiary hearing."

Appellants' assignments of error one (1), two (2) and four (4) are not well taken and are overruled.

For their third assignment of error appellants submit the following:

> "III. THE COMMON PLEAS COURT ERRED AS A MATTER OF LAW BY INTERPRETING THE OHIOCORPORATE APPRAISAL STATUTE ACCORDING TO ECONOMIC THEORIES EXPRESSLY REJECTED BYTHE OHIO SUPREME COURT."

We disagree. The Court of Common Pleas of Hancock County did not interpret the Ohio corporate appraisal statute by any economic theories. Rather,the Ohio Supreme Court interpreted the statute and remanded the cause to the trial court with clear instructions to resolve two specific, narrow issues. We find that the trial court complied with the mandate of the Ohio Supreme Court in resolving the issues remanded and conducted no interpretation of R.C. 1701.85 whatsoever.

Appellants' assignment of error three (3) is not well taken and is overruled.

For their fifth assignment of error appellants submit the following:

> "V. THE COMMON PLEAS COURT DENIED SHAREHOLDERS DUE PROCESS OF LAW BY AWARDING ARATE OF INTEREST SELECTED SOLELY UPON REVIEW AND CONSIDERATION OF EVIDENCE NOTPROPERLY ADMITTED TO THE RECORD."

In support of this assignment of error appellants argue that the trial court premised its decision, establishing an equitable rate of interest, upon evidence not properly admitted to the record. More specifically, appellants cite the trial court's consideration of various excerpts from the Wall Street Journal included in appellee's memorandum to the trial court which were

not properly authenticated. Further, appellants argue that the consideration of this evidence acted to deny them their constitutional rights of confrontation,cross-examination and due process because no reply memoranda nor additional evidentiary hearings were permitted.

Evid. R. 902(6) provides as follows:

"Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: " * * *

"(6) Printed materials purporting to be newspapers and periodicals, including notices and advertisements contained therein."

The Wall Street Journal is such a newspaper or periodical as to beself-authenticating. While there are further prerequisites to admissibility,appellants raise only the issue of authenticity.

Appellants further argue that the admission and consideration of such evidence absent an opportunity to confront and cross-examine constitutes a violation of appellants' rights of confrontation, cross-examination and due process.

As noted earlier, appellants had ample opportunity to introduce evidence and refute that offered by appellee in the initial trial. Furthermore, the trial court's findings neither cite nor indicate reliance upon the Wall Street Journal articles submitted by appellee.

Upon noting that no further evidentiary hearings were necessary and that it was sufficient for the parties to submit written briefs upon the issue,the Ohio Supreme Court instructed the trial court to proceed "within its own discretion, [to] determine an interest rate 'which the court considers equitable'". In so doing, "[t]he trial court therefore should have considered other evidence as presented by the parties, including, but not limited to, the prevailing rate of interest for various kinds of loans, the prime rate over that period of time and any other such evidence". We find that the trial court complied with the mandate of the Ohio Supreme Court.

Appellants' fifth assignment of error is not well taken and is overruled.

For their sixth assignment of error appellants submit the following:

> "VI. THE COMMON PLEAS COURT ABUSED ITS DISCRETION BY AWARDING A RATE OF INTERESTAGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

"Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." C.E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St. 2d 279;

Seasons Coal Co. v. Cleveland(1984), 10 Ohio St. 3d 77. The weight to be given the evidence and the credibility of the witnesses are matters for the trier of fact, Seasons Coal Co., supra; State v. DeHass (1967), 10 Ohio St. 2d 230; Barton v. Ellis (1986),34 Ohio App. 3d 251, and any difference of opinion as to the weight and credibility of the evidence is not a legitimate ground for reversal. Seasons Coal Co., supra.

In the case sub judice, we find the trial court's judgment on remand as to the correct rate of interest, to be supported by competent, credible evidence going to all the essential elements of the case. The record does not demonstrate the in depth rationale of the trial court in determining 8.5% to be the equitable rate of interest, however, the record does not illustrate any abuse of discretion on the part of the trial court.

Appellants' sixth assignment of error is not well taken and is overruled.

For their seventh assignment of error appellants submit the following:

> "VII. THE COMMON PLEAS COURT DENIED SHAREHOLDERS DUE PROCESS OF LAW BY AWARDINGA RATE OF INTEREST UNRELATED TO THE INSTRUMENTS INVOLVED IN THE TRANSACTION,SUCH THAT WHEN THE IMPROPER INTEREST IS PAID UPON THE APPRAISED VALUE,THE EFFECT IS TO PUNISH SHAREHOLDERS FOR SEEKING THE CONSTITUTIONALLY MANDATEDREMEDY OF APPRAISAL."

In support of this assignment of error appellants argue that the disparity in the final amounts received by the dissenting and assenting shareholders constitutes a denial of due process of law. When the Marathon shareholders who agreed to the merger cashed in their notes they received total compensation of $162.15 for each of their shares. According to the judgment of the trial court on remand the dissenting shareholders will receive $ 104 for each of their shares.Appellants contend that this disparity is attributable to an unreasonable interest rate awarded by the trial court.

We disagree. The Ohio Supreme Court in Armstrong and R.C. 1701.85 both provide that in establishing the fair cash value to be paid dissenters, the court must take into account the appreciation or deprecation in the market value of the stock attributable to the proposed merger. The rationale underlying this principle is that, if the stock appreciates as a result of the merger, the dissenting shareholders should not be entitled to benefit from the increased value. Likewise, if the market value of the stock

depreciates, the dissenting shareholders should not be penalized for the decreased value. On remand, the trial court found the value of the stock on the day prior to the approval of the merger to be $ 75.75. However, that sum was adjusted to $ 68.43 so as not to allow the dissenters to benefit from the corporate transaction from which they dissented. Therefore, it is apparent that the application of R.C.1701.85 is likely to produce a fair cash value to be paid dissenting shareholders different from that received by assenting shareholders unless the fundamental corporate change is found to have had absolutely no effect on the market price of the stock, an unlikely possibility. For this court to find that this disparity constitutes a due process violation would in essence permit dissenting shareholders to shield themselves from any loss as a result of the depreciation of the stock and permit them to benefit from any appreciation in the stock, a "no lose" proposition. This is obviously not the extent of protection the legislature intended to provide for minority shareholders dissenting from a fundamental corporate change.

The Supreme Court remanded the issue of the interest rate to be awarded appellants to the trial court with the instructions to disregard R.C.1343.01(A) and, instead, consider the various factors introduced by the parties earlier in the initial trial to arrive at an equitable rate of interest. The record demonstrates that the trial court complied with the mandate of the Supreme Court. While we may not have found the equitable rate of interest to have been 8.5%, we are nonetheless bound by the trial court's findings absent an abuse of discretion. C.E. Morris Co., supra.

Appellants seventh assignment of error is not well taken and is overruled.

For their eighth assignment of error appellants submit the following:

> "VIII. THE COMMON PLEAS COURT PROCEEDED CONTRARY TO THE JUDGMENT OF THIS COURTIN 1986 AND THE SUPREME COURT IN 1987 AND DENIED SHAREHOLDERS DUE PROCESS OF LAWBY DENYING THE RIGHT TO ENGAGE IN DISCOVERY AND INTRODUCE EVIDENCE TO THOSESHAREHOLDERS WHO HAD PREVIOUSLY BEEN DENIED THE RIGHT TO PARTICIPATE IN THETRIAL OF 1984."

As previously noted, the Ohio Supreme Court did not anticipate any necessity for further evidentiary hearings on any of the issues presented to the trial court on remand. In the initial trial appellants had a duty to present a complete case on behalf of those represented and were in fact invited by the trial court to introduce testimony as to all relevant

theories of valuation and interest. The subsequent addition of additional dissenting shareholders to the class does not grant appellants the right to introduce further evidence which they have already had not only an opportunity but also a duty to present. The Price Trust was the only group for which the Ohio Supreme Court provided for additional discovery and proceedings and they have settled their claims.

Appellants' eighth assignment of error is not well taken and is overruled.

For their ninth assignment of error appellants submit the following:

> "IX. THE COMMON PLEAS COURT DENIED SHAREHOLDERS DUE PROCESS OF LAW BYESTABLISHING THE ENDING DATE FOR THE PAYMENT OF INTEREST AS THIRTY DAYS FROMTHE DATE OF THE JUDGMENT, THEREFORE PREJUDICING SHAREHOLDERS' RIGHT OF APPEAL."

In support of this assignment of error appellants argue that App. R. 3 allows an appellant thirty days within which to file a Notice of Appeal. The trial judge provided the shareholders only thirty (30) days to comply with his order.Therefore, if the shareholders chose to exercise their right to appeal,they were denied the right to continue to receive interest on the judgment.

We disagree. As cited by Marathon, appellants entered into a stipulation in the trial court, filed June 23, 1988, providing essentially as follows:

"Appellants Francis A. Armstrong, Cede & Co., Gordon T. Hoddinott, Douglas B.Littlewood, and Donald M. White have withdrawn their respective Motions for Stay of Order and Judgment Pending Appeal on the condition that Appellants' standing to pursue these appeals, including appeal of the trial court's Judgment Entry of April 6, 1988, and to potentially obtain additional payments pursuant to future judgments will not be prejudiced; nor have Appellants waived the right to have these judgments altered on appeal by the surrender of shares and acceptance of payment of the amount due them in accordance with the trial court's Judgment Entry of April 6, 1988."

As is apparent, appellants have filed their appeal, the merits of which we consider herein. Accordingly, we find that upon entering into such stipulation appellants waived their right to assign error to the trial court's entry to the extent that it allows interest for thirty (30) days. Further, being indirect compliance with R.C. 1701.85 we find no error on the part of the trial court absent this waiver.

Appellants' ninth assignment of error is not well taken and is overruled.

In conclusion, appellants mischaracterize this appeal by asking this court to do indirectly what we cannot do directly; overrule the Ohio Supreme Court. This cause was remanded to the Court of Common Pleas of Hancock County for the resolution of two very specific issues.

The Supreme Court instructed the trial court as to how to determine the initial fair cash value to be paid the dissenting shareholders and to adjust for depreciation or appreciation in the value attributable to the proposed merger.Secondly, the trial court was to consider the relevant factors in determining an equitable rate of prejudgment interest. In sum, we can glean no departure in the trial court's findings from the mandate of the Ohio Supreme Court and the record demonstrates no reversible error.

Accordingly, appellant's nine (9) assignments of error are not well taken and are overruled. Having found no error prejudicial to the appellants herein, in any of the particulars assigned and argued, the judgments of the trial court are affirmed.

Judgments affirmed.

IN THE COMMON PLEAS COURT OF HANCOCK COUNTY, OHIO

Frances A. Armstrong,
Plaintiff Case Nos. 82-342-M, 82-365-M,
82-379-M, 82-387-M, 82-400-M,
vs. : 82-402-M
Marathon Oil Company : MEMORANDUM
Defendant

****

March 18, 1988

On September 25, 1987, the Supreme Court of Ohio remanded to this Court the above case. The remand gave clear and unequivocal instructions on what this Court was required to do. We are here now to carry out the instructions of the remand.

The Court has had the benefit of a protracted hearing before this Court in October, 1982. It was, as the Supreme Court points out at p. 401 of opinion (The full official citation of the Supreme Court opinion is Armstrong vs. Marathon Oil Co (1987), 32 Ohio St. 3d 397), a "full hearing". At this hearing, the plaintiff dissenting shareholders (hereinafter collectively "Armstrong") were permitted over the strenuous objection of defendant corporation to demonstrate their estimate of the fair cash value of the stock of defendant, Marathon Oil Co. (hereafter "Marathon"), basing their estimate of such fair cash value on the intrinsic value of the stock.

At the same time, Marathon in their presentation, approached the case from the standpoint of the willing seller-willing buyer on the stock exchange and further upon the general market analysis of the oil industry.

After the original hearing, this Court (and this Judge) ruled that the fair cash value of the stock of Marathon should be the price of the stock on the New York Stock Exchange as of January 6, 1982, which was $78 per share. This Court also established a rate of interest to be paid by Marathon.

When this Court received the opinion of the Supreme Court reversing the Court of Appeals for the 3rd Appellate Judicial District, the Court noted that the Supreme Court, speaking through Justice Holmes, agreed that the fair cash value of the shares of Marathon should be determined from the market value of the stock when "the indicia of significant market trading is manifest" (p. 411 of Opinion) and if "a reasonably sufficient actual market does exist, there is no need to construct a hypothetical market." (p. 411).

Thus, in determining the fair cash value of stock held by dissenting shareholders under the statute controlling these matters, (R.C.

1701.85), the inquiry should first focus on the degree of sales activity on the major exchanges. That activity becomes, as Justice Holmes points out, a "benchmark for the willing seller-willing buyer standard" (P. 412).

This Court did look to the major exchanges and found that a significant amount of sales activity in Marathon stock existed between willing sellers and willing buyers and held that the key date was January 6, 1982, and not March 10, 1982. In doing so, this Court determined the closing price of Marathon stock was $78 per share on January 6, 1982.

The statute requires that the court is to look to the fair cash value of the day prior to that on which the shareholders vote on the corporate transaction was taken (Opinion, syllabus 3, p 397). Thus, this Court was in error in assigning a date of January 6, 1982, and should have established the correct date for the valuation of the stock. This date has been determined by the Ohio Supreme Court as March 10, 1982. Pursuant to that determination this Court entered the date of March 10, 1982, as the date for the valuation of the stock and established the price of $75.75, the closing price of the stock on the New York Stock Exchange as the fair cash value of one share of Marathon stock. That evidence is clearly before the Court and the Supreme Court has so determined.

But the Supreme Court then says, on p. 413 and its Opinion, "...all factors concerned with, or reasonably affecting, any appreciation of the stock should have been reviewed and decided by the trial court. Accordingly, this matter is reversed and the cause is remanded to the trial court for the limited determination of what appreciation or depreciation, if any, existed due to the U.S. Steel proposal submitted to the Marathon shareholders.

The Court must therefore grapple with the limited issue of the determination of appreciation or depreciation of the stock, if any, caused by the U.S. Steel proposal. Other than the interest issue, to be discussed later on, that is the sole question on the determination of fair cash value.

Before attacking this complex problem, Armstrong suggests that there are grave constitutional issues here. This is not tenable. If it is true, and it is expressed quite clearly in State vs Perry (1967), 10 Ohio St. 2d 175, that in criminal matters (where counsel is required - not just urged or permitted, at every stage of the criminal proceedings) Constitutional issues cannot be considered in post-conviction proceedings under Section 2953.21 et seq., Revised Code, where they have already been or could have been fully litigated by the prisoner while represented by counsel (See Syllabus 7), then how much more clear is it in civil matters that Constitutional issues cannot be raised where the civil litigants had an opportunity to raise such Constitutional issues in the case in chief. There

were absolutely no constraints placed upon the plaintiffs or any one of them in the presentation of their case in chief. The Court is further not impressed by the fact that the case is so old the firm that originally tried it is no longer in existence. Plaintiff's counsel still includes an original member of the plaintiff's team and plaintiff's subsequent counsel knew of the original record and must live with such record.

Armstrong urges that the due process of any one excluded by this Court in the original hearing which order of exclusion was reversed by the Supreme Court has been violated. The Supreme Court has addressed this issue with respect to the Price Trust (who are no longer in the case having settled and adjusted their differences with Marathon). That is still applicable with respect to these others.

The Supreme Court points out on p. 419, "Also, the issues, pursuant to our determination of the first (valuation) issue above, have been considerably narrowed, and are resolvable without recourse to a further evidentiary hearing."

True, Price Trust was given an opportunity to put forward any new evidence upon such issues as have not already been placed on the record but the only issue is if the stock was appreciated or depreciated and the amount of interest. Armstrong says that the new evidence that they would put forward is that The First Boston Report would have caused the stock of Marathon to go to $200 on the New York Stock Exchange. This is not the fact as their own witnesses have shown. Dr. Amling, a very sophisticated and talented investment consultant and author in the field, stated that the truth is that the market price of stocks is generally one-third that of book value. Further, the Radol case (Radol et al vs Thomas, 772 F 2d 244, cert din 106 S Ct 3272) makes it clear that such things as The First Boston Report (or the Strong Report, made internally by Marathon to determine asset values of the various divisions and properties of Marathon, both of which were available prior to US Steel's tender) should not be admitted in a case involving an alleged (in simplistic terms) breach of a corporate fiduciary relation. But here, Armstrong did bring up not only the Strong Report, but the First Boston Report and John Herold's Reports of the oil industry. To bring on any other witnesses to show that these reports would cause the stock to rise to the values set forth in those reports is to fly in the face of Armstrong's own witnesses and is a not very disguised attempt to reinstitute the intrinsic evaluations procedure denied by the Supreme Court of Ohio.

What difference would it make in real life? None. The evidence is before the Court. The issue here (exclusive of interest determination) is

appreciation or depreciation of Marathon Oil Stock by the Mobil-U.S. Steel experience.

Mobil Corporation (Mobil) on October 30, 1981, announced a hostile take-over bid for Marathon Oil Company at $85 per share. On October 29, 1981, the stock of Marathon Oil Company traded on the New York Stock Exchange (NYSE) for $63.75 per share. The Mobil announcement was greeted on the Monday following the announcement of the proposed take over with a flurry of trading activity. Obviously, an offer such as this -- $21.25 more than the October 29, 1981, closing price would be attractive -- and the price on the NYS1J went to almost $90 but within 20 calendar days thereafter fell to a little under $76. On November 20, 1981, the day after the U.S. Steel offer was made, the price of Marathon stock per share rose to $108. On January 7, 1982, the day after U.S. Steel purchased the shares pursuant to their tender the price was about $76 a share.

Two things are instantly apparent: First: Notwithstanding the fact that the values established by The First Boston Report which was common knowledge to every one cognizant of the oil business, the price of Marathon did not reach $200 or even go near it; and, second: The U.S. Steel offer did appreciate Marathon's stock price.

Yet it is noteworthy that in this period from October 30, 1981, to March 10, 1982, stocks in comparable oil companies, both domestic and international, declined! Only one company's stock went up! And that was ~arathon! And this, despite an "horrendous bear market", as one witness described it.

The Standard & Poor Index (S & P) for International Oils (which include Exxon, Gulf, Mobil, Royal Dutch Shell, Standard of California, & Texaco) shows that in the first week of October, 1981, the index was 210.8. It dropped to 205 in the second week of October, rose to 220.4 in the first week of December, 1981 and then fell to 182 in the second week of March, 1982, after having been down to 176.8 in the first week of March, 1982.

The S & P Domestic Oil Index (consisting of Atlantic-Richfield, Occidental, Gerry, Phillips, Shell (US), Standard of Indiana, Standard of Ohio, Sun, and Unocal) followed a similar path reaching its zenith in the second week of December, 1981, (357.3up from 327.2 in the fourth week of October) only to drop dramatically to 236.12 in the first week of March, 1982.

So we want to know what is the effect of the US Steel offer on Marathon's prices on the NYSE? Obviously, the US Steel offer had a great effect.

Dr. Robert Hamada testified at length not only on his studies of the Marathon stock but on the stock market in general. It is not important to talk of stock market efficiency in the sense of "informationally" or "value" efficient. We simply cannot say what the price Marathon would have commanded on March 10, 1982, or even today, had there been no Mobil or no US Steel tender. This Court would have felt better about Dr. Hamada's analysis if he had shown the Court a projection starting, say on October 30, 1980, and going to October 29, 1981. If the values had matched, that would have been impressive. Then an analysis from October 30, 1981, to March 10, 1982, would have been really impressive indeed!

But certainly, Mobil, and particularly US Steel, caused an appreciation in the value of Marathon's stock and after comparing the activity of comparable stock in Exhibit M of the opinion of this Court, it is the opinion of this Court that the stock of Marathon Oil Company was appreciated to $68.43 per share.

The Radol case (op cit) made it quite clear that a business judgment was made by Marathon's board of directors and such a judgment will not be disturbed absent fraud, bad faith, or abuse of discretion (Citing 12 O Jur 3d §415, at 63-64 (1979); Ohio National Life Ins Co vs Struble, 82 Ohio App 840, appeal dismissed, 150 Ohio St 409 (1948), as well as RC 1701.59(c).)

It is therefore unnecessary to address a sale of assets; restructuring of the company, stock splits, liquidations, and the like. Not one shred of evidence is present now nor has there ever been of fraud, bad faith, or abuse of discretion. Indeed, one of plaintiff's witnesses testified he tendered his Marathon stock for Mobil's $85 per share tender. No evidence of fraud here!

Now we must address interest. In the earlier ruling the Court established the interest at 8% per annum based essentially on the maximum rates of interest established by the Revised Code of Ohio (RC 1343.02(A)). This was determined to be in error by the Supreme Court for the very good reason that such determination did not consider other evidence including, but not limited to the prime rate, prevailing rate for various kinds of loans over the period, and any other such evidence. The only restraint being that of prohibition against usury.

Armstrong suggests an effective rate of interest of 17.2~%. This figure is suggested by the fact that the Supreme Court set forth in its opinion that the Court adopt the prevailing rate of interest inasmuch as Armstrong gave Marathon a long term loan. The Court will note this argument but it must, under the Supreme Court's opinion at p 420; give consideration to other factors.

Plaintiff Littlewood who presented a brief suggested an effective rate of interest of 17.77% based upon a formula suggested by Professor Brigham. Again, the Court must give consideration to other factors.

Marathon suggested an interest rate which reflected the rate of dividend return per share, or 4.2%. This is a historic yield and must be considered along with other factors.

Marathon also submitted the price of T-bills over the entire period of this case along with prime rates, Fannie Mae yields on 30 year mortgages, commercial paper, CD's, even Eurodollars and LIBOR (London Interbank Offered Rates).

Considering all of these factors over the entire period of the protracted litigation the Court finds that the equitable interest rate is 8.5%.

The Court therefore having determined the fair cash value of a share of Marathon Oil Stock to be $68.43, each plaintiff and each holder of outstanding stock of Marathon shall receive $68.43 for each share of stock owned plus interest thereon at the rate of 8.5% from March 11, 1982, to the date of payment or until 30 days after entry of judgment, which ever is earlier. Marathon may deduct from such sum as hereinbefore determined an amount already paid by Marathon heretofore.

The costs of this matter will be split equally between Armstrong and Marathon with Marathon paying half and Armstrong the other half.

Marathon to prepare entry. All parties to have exceptions.

ROBERT D. WALKER,
PRESIDING JUDGE

IN THE COMMON PLEAS COURT OF HANCOCK COUNTY OHIO

FRANCES A. ARMSTRONG, ET AL :
Plaintiff : Case Nos. 82-379-M
82—342—M,82—387- -M,82—365-M,
vs. : 82—400—H, 82—401—M
MARATHON OIL COMPANY: MEMORANDUM
Defendant

January 8, 1988

The Court has been asked to continue and stay the proceedings in this cause by counsel for Frances A. Armstrong in 82-365-M. Specifically, the motion of plaintiff refers to the establishment by the Court of January 15, 1988, as the deadline for the identification of expert witnesses; February 15, 1988, as the deadline for completion of discovery; and March 14, 1988, for trial.

Several reasons for the motion are set forth in the motion that will be addressed at the proper time.

The Court has reviewed carefully the decision of the Ohio Supreme Court decided September 25, 1987 (32 Ohio St 3d. 397).

In that opinion, the Supreme Court of Ohio, held at page 413, that the trial Court "should have first established the correct date for the valuation of the stock, i.e., March 10, 1982." At this time, complying with that mandate, the Court will establish March 10, 1982, as the date for the valuation of the Marathon Oil Company stock (MRO, as it was then identified on the ~Big Board" - The New York Stock Exchange). Complying with that mandate, it is easy to establish that the price for Marathon Oil Company stock on that date was S75.75 per share at the bell, or the closing price of MRO.

The Ohio Supreme Court's opinion at the same page (p 413), mandates this Court, and again copying direct from Justice Holmes' opinion: "Second, all factors concerned with, or reasonably affecting, any appreciat.on of the stock should have been reviewed and decided by the trial Court."

To comply with this mandate, the Court has carefully read the entire transcript of the trial. Orly a few of the witneses address appreciation and depreciation. To permit any additional testimony would be counterproductive. When this Court declared that additional experts would be permitted, this Court was proceeding precipitiously and on the basis of the case in chief. Both parties were permited a wide range of inquiring to

the consternation of both sides at the original case. And this Court proposed to extend that inquiry. Obviously, this is not necessary as the Supreme Court of Ohio remanded this cause "for the limited determination of what appreciation or depreciation, if any, existed due to the U.S. Steel proposal submitted to the Marathon shareholders".

This issue has been addressed by both parties extensively in the case in chief. This Court must only comply with the clear mandate. Accordingly, no new experts will be permitted either side but memoranda will be delivered to the Court by February 15, 1988, on this issue and arguments will be heard on March 14, 1988. No reply briefs or memoranda will be permitted. The matter involving Price Trust is now moot.

But the Supreme Court did, at part V (page 420 of the opinion of Justice Holmes), note that the Court of Appeals was correct in holding that the statutory rate of interest was not controlling. The opinion says, "The trial court therefore should have considered other evidence as presented by the parties, including, but not limited to, the prevailing rate of interest for various kinds of loans, the average prime rate over that period of time and any other such evidence.~ There is but one constraint, that of the statutory ban on usury (R.C. 1343.01 et sec). To achieve that end therefore memoranda will be submitted by February 15, 1988, by both sides, without replies thereto, and arguments on that issue following the appreciation -depreciation issue on March 14, 1988. It is clear, therefore, that the Court is not disposed to delay this matter further.

The problems set forth by the Armstrong counsel are real enough. This case has been going on a long time. It is an extremely costly matter for all concerned. But the opinion of the Ohio Supreme Court has been before us for three months now. The opinion of this Court has been before all parties for five years. The date set forth for argument has been known by all concerned since the meeting of October 30, 1987, with all counsel present.

Even if present lead counsel find it necessary to resign, Mr. Kostyo, has been involved in the cause since the outset. He represents Cede & Co (82-342-M), Mr. White (82-387-M), Mr. Littlewood (82-400-M) and Mr. Hoddinott (82-401-M). Mr. Kostyo participated agressively in both direct examination and cross-examina.ion of the several witnesses. He must be considered as a knowledqeable person on the cases.

The Court also recognizes that lawyers have no stock in trade but their advice and for this advice they are entitled to be paid but this Court has an obligation to all the citizens of this county and all the litigants appearing before to proceed as expediously as possible.

There is a suggestion that a writ of cersiorari may be sought from the Supreme Court of the United States. Notwithstanding, and until such writ is granted, this wholly state matter will proceed under the clear mandate of the Ohio Supreme Court for determination of the "fair cash value" of the Marathon Oil Company stock under the provisions of RC 1701.85.

ROBERT D. WALKER, JUDGE

THE SUPREME COURT

OF OHIO

ARMSTRONG et al., Appellees; Harrell, Appellee and Cross-Appellant,

v.

MARATHON OIL COMPANY, Appellant.

Decided Sept. 25, 1987.

Nos. 86-399, 86-400 to 86-405. Reported at 32 Ohio St.3d 397, 513 N.E.2d 776, 56 U.S.L.W. 2219

Syllabus by the Court:

1. Under the terms of R.C. 1701.85, a shareholder who dissents from a merger or certain other enumerated corporate transactions is granted the right to seek payment of the "fair cash value" of the shares of the corporation. That section defines "fair cash value" as the amount a willing seller, under no compulsion to sell, would be willing to accept, and a willing buyer, under no compulsion to purchase, would be willing to pay for a share of stock of the corporation to be merged.

2. Where facts presented to the trial court evidence a reasonably suitable, active market of the particular corporate stock under consideration, and the actual market may be deemed to be sufficiently active in the trading of such stock, then the trial court should give substantial weight to such evidence. This actual market price would satisfy the willing seller-willing buyer test set forth in R.C. 1701.85, and would be the "fair cash value" of such stock.

3. If such active market trading of the stock in question is so found, the fair cash value is properly measured pursuant to R.C. 1701.85(C) as the stock market price of the shares as of the day prior to that on which the shareholders' vote on the corporate transaction was taken, excluding any appreciation or depreciation in that price resulting from the proposal submitted to the shareholders.

4. The requirement in R.C. 1701.85(B) that "(t)he court shall thereupon make a finding as to the fair cash value of a share" dispenses with the requirement of a jury trial in such special statutory proceeding.

5. Insofar as R.C. 1701.85 sets forth "a special proceeding within the meaning of section 2505.02 of the Revised Code," and provides for an interest rate based upon all equitable considerations, then the statutory rate

set forth in R.C. 1343.01(A) is not controlling. The rate should be determined from the written evidence submitted by the parties upon this issue.

6. A trial court may not order parties remaining in an action to comply with the discovery requests of a party dismissed with prejudice from the action.

7. When a cause of action is reinstated by a court of appeals and remanded for further proceedings to the trial court, such reinstatement is in statu quo ante, and the lower court is required to proceed from the point at which the error occurred.

Decided Sept. 25, 1987.

The within consolidated cases involve the appeal of issues arising out of the two-step merger between Marathon Petroleum Company ("Marathon") and a subsidiary of the United States Steel Corporation ("U.S. Steel"). This merger occasioned the filing of a series of lawsuits by dissenting shareholders of Marathon in the Common Pleas Court of Hancock County primarily seeking a determination of "fair cash value" for their shares of stock pursuant to R.C. 1701.85.

The major issue presented upon appeal by Marathon is whether the trial court or the court of appeals utilized the correct method of determining "fair cash value" of the dissenters' shares. Another issue presented upon this appeal is the eligibility of certain Marathon shareholders to participate in the proceedings to determine "fair cash value" based upon whether they had complied with R.C. 1701.85(A) providing for the notice to be given to the corporation of their decision to demand fair cash value. The trial court determined that improper notice had been given by some three hundred seventy-one stockholders in that their demand, as filed by Frances Armstrong, had not properly evidenced Armstrong's agency. The court of appeals reversed. The third issue presented is whether the court of appeals erred by holding that the trial court had abused its discretion in denying motions for a continuance of the scheduled trial on the merits to permit Price Trust, which represented certain dissenting shareholders, to engage in pretrial discovery upon the issue of fair cash value. The remaining issues, which shall be explained more fully, are whether the proceeding under R.C. 1701.85 allows a jury trial or joinder of other causes of action and whether the trial court improperly determined the rate of prejudgment interest.

The issues which we must resolve are based upon the following facts. In 1981, the officers and management of Marathon recognized that the company might be a target for a "takeover" in that Marathon stock was selling on the New York Stock Exchange at a price somewhat lower than the market value of the company's assets. Accordingly, Marathon obtained two valuations, one by First Boston Corporation, a New York investment banking firm, and the other by John F. Strong, the assistant to the president of Marathon. The First Boston report indicated a per-share value of Marathon stock of between $188 and $225, whereas the Strong report indicated a per-share value of Marathon stock of between $276 and $323. Both of these reports were predicated upon the net equity value of Marathon, that is, the value of Marathon assets less liabilities.

On October 30, 1981, Mobil Corporation announced a tender offer to purchase up to forty million shares (approximately sixty-seven percent) of Marathon stock at $85 per share. Mobil indicated that, if successful in acquiring at least thirty million shares (approximately fifty-one percent of outstanding stock), it would seek to acquire the remaining shares through an exchange or merger offer, by which shareholders would receive securities valued by Mobil at $85 per share.

On the following day, Marathon's board of directors called an emergency session. Therein, it was determined that the Mobil offer was grossly inadequate and not in the best interest of Marathon or its shareholders. The board consequently authorized Marathon's officers to take the appropriate steps necessary to block Mobil's takeover attempt, including (1) sending letters to Marathon shareholders urging them not to tender their shares to Mobil; (2) filing an action seeking to enjoin the Mobil takeover; (3) initiation of efforts to secure a "white knight," i.e., someone who could extend a friendly takeover tender; and (4) consideration of a complete or partial liquidation of Marathon. On November 1, 1981, Marathon filed an action in the United States District Court alleging that the Mobil tender offer violated various federal antitrust regulations, and sought to enjoin the planned takeover by Mobil. Marathon's action was eventually successful.

The aid of First Boston was enlisted to search for other companies which might be interested in acquiring Marathon at a price substantially higher than the Mobil tender offer. This search for a "white knight" successfully culminated in the announcement, on November 19, 1981, that Marathon and U.S. Steel had entered into a merger agreement. Under the terms of the merger proposal, U.S. Steel would extend a tender offer for

fifty-one percent of the outstanding stock of Marathon at a price of $125 per share. This was to be followed by a merger proposal in which each remaining Marathon shareholder would receive a $100 face value twelve-year bond, paying a guaranteed twelve and one-half percent interest, for each remaining share of Marathon stock.

In acting favorably upon the U.S. Steel offer, it appears from the evidence that the Marathon board of directors relied upon the opinion of First Boston, its financial advisor. It was First Boston's view that the U.S. Steel offer of $125 per share for fifty-one percent of the stock combined, with the issuance of the notes for the balance, would have a "blended value" of $106 per share. Further, it appears that upon First Boston's advice, the Marathon board determined that such a price was fair to Marathon shareholders and, upon advice of counsel, that acceptance of such an offer would be a reasonable exercise of business judgment. By December 4, 1981, approximately 91.4 percent of Marathon shares had been tendered to U.S. Steel. By way of contrast, only approximately forty-seven percent of Marathon shares had been tendered to Mobil in response to its tender offer at $85 per share.

As part of the U.S. Steel offer, it received an option to purchase ten million authorized, but unissued, shares of Marathon for $90 per share. It also received an option to purchase one of Marathon's largest assets, a forty-eight percent interest in the Yates oilfield for 2.8 billion dollars. Not only was there then litigation in the federal court with respect to Mobil's tender offer, but an action was also commenced in federal court with respect to the U.S. Steel tender offer, particularly the granting of the above options.

On December 23, 1981, the United States Court of Appeals for the Sixth Circuit affirmed a district court's ruling that the two options granted U.S. Steel were illegal, manipulative and intended to discourage other tender offers for Marathon stock. It ordered U.S. Steel to relinquish both options. Upon remand, which occurred the next day, the district court extended the date by which shareholders could withdraw their acceptance of the U.S. Steel offer until January 6, 1982. However, the court made no change of the December 4, 1981 proration date, that is, the date by which Marathon shareholders had to tender their shares to U.S. Steel.

Thereafter, on January 7, 1982, U.S. Steel purchased approximately fifty-one percent of Marathon's stock, consisting of approximately thirty million of Marathon's outstanding shares, by accepting the tenders of more than ninety percent of the Marathon stock on

a prorated basis. In the interim, Mobil announced that if the U.S. Steel offer, including the options, were ruled illegal, Mobil would increase its tender offer to $126 per share. Additionally, Gulf Oil Company then proposed to discuss a merger with Marathon at a price of approximately $120 per share, but no meaningful negotiations ever took place. Subsequently, on March 11, 1982, the second step of the acquisition of Marathon by U.S. Steel was completed by approval of the merger by shareholders owning more than two-thirds of all Marathon shares, including the fifty-one percent now owned by U.S. Steel.

Frances A. Armstrong, an owner of two hundred shares of Marathon stock, together with a number of shareholders consolidated into the so-called Marathon Shareholders Committee, and various additional shareholders, filed petitions in the Hancock County Common Pleas Court. Their claim was essentially founded upon R.C. 1701.85 and was for the purpose of seeking a determination and award of the "fair cash value" of their stock.

In the initial phase of the proceedings, the trial court determined that approximately four hundred plaintiffs were eligible under the statute to have the fair cash value determined. Other shareholders were deemed by the trial court to be ineligible to participate in the proceeding. Among these were certain plaintiffs for whom Armstrong sought to demand fair cash value. The trial court determined that Armstrong had failed to include with her demand letter the evidence of authority to act on their behalf as the court felt was required by Klein v. United Theaters Co. (1947), 148 Ohio St. 306, 35 O.O. 298, 74 N.E.2d 319. On this point, the court of appeals reversed.

In another facet of these cases, Lillian Werk Price, as trustee for a number of other Marathon shareholders, had been ruled ineligible by the trial court to participate in the fair cash value proceeding. This determination was reversed by the court of appeals. Price, upon remand, twice moved the trial court for a continuance in order to utilize the extensive discovery of the other plaintiffs in the preparation for trial. The trial court, exercising its discretion in the matter, denied the motion for continuance. The court of appeals reversed the trial court on this issue.

Dorothy M. Harrell, proceeding pro se, sought to obtain a jury trial under the R.C. 1701.85 proceeding. Also, Harrell sought to join a number of other causes of action into the proceedings below. Moreover, at trial she sought to present evidence concerning the appropriate amount of interest which ought to be awarded. The trial court refused joinder as to

these other causes of action and denied a jury trial. It ruled that the appropriate rate of interest was no more than eight percent pursuant to R.C. 1343.01(A). The court of appeals upheld the trial court on the jury trial and joinder issues, but reversed on the interest issue, which, it was determined, should have been based upon the evidence offered by the parties.

Although R.C. 1701.85(B) provides that the trial court "may appoint one or more persons as appraisers to receive evidence and to recommend a decision on the amount of the fair cash value," the trial judge here recognized that the statute gave him final responsibility to make a finding as to the fair cash value of the stock. He consequently opted not to appoint appraisers in these cases. This was, of course, fully within the trial court's discretion under the statute and is not an issue upon appeal.

A full hearing on the issue of fair cash value, consisting of approximately three weeks of trial, was conducted by the trial court. Evidence was adduced by the various dissenting shareholders concerning their estimate of the fair cash value of their shares of stock, based upon the intrinsic value of the stock. Additionally, evidence of stock value, primarily based upon the willing seller-willing buyer test upon the stock exchange, and upon general market analyses of the oil industry, was addressed by appellant Marathon.

Upon conclusion of the hearings, the trial court rendered an in-depth decision. It basically concluded that the willing buyer-willing seller language of R.C. 1701.85 meant market value of a single share of stock rather than an intrinsic value. The court also found that, under the circumstances of this case, the stock market price provides the controlling evidence. However, instead of using the market price of March 10, 1982, which was the day prior to the vote of the shareholders, and adjusting the price to avoid the effect of the pending merger as called for by the statute, the trial court adopted the market closing price of the stock on January 6, 1982, which was $78 per share, as reflecting fair cash value as of March 10, 1982.

The dissenting shareholders appealed, attacking the standard utilized by the trial court in determining fair cash value. Marathon cross-appealed challenging the trial court's use of January 6, 1982, rather than March 10, 1982, as the date to determine the fair cash price as adjusted. The court of appeals reversed the trial court as to the dissenting shareholders' appeal as well as Marathon's cross-appeal. This cause is

now before the court pursuant to the allowance of motions to certify the record.

Ulmer, Berne, Laronge, Glickman & Curtis, Marvin L. Karp and Stephen A. Markus, Cleveland, for appellees Armstrong et al. Weasel & Brimley and John F. Kostyo, Findlay, for appellee White. Benesch, Friedlander, Coplan & Aronoff, John J. Duffey and Jack Gregg Haught, Columbus, for appellee Price, Trustee. Dorothy M. Harrell, pro se. Jones, Day, Reavis & Pogue, John L. Strauch, John M. Newman, Jr., Robert R. Weller, Susan J. Becker, Cleveland, Rakestraw & Rakestraw and Russell E. Rakestraw, Findlay, for appellant. Murray & Murray Co., L.P.A., Dennis E. Murray and Kirk J. Delli Bovi, Sandusky, urging reversal for amici curiae, Charles Nickels et al.

HOLMES, Justice.

I

We deal here with the difficult subject of the manner and criteria for the determination of the amount to be paid to a dissenting shareholder of a corporation which is to be merged into, or whose assets are to be sold to, an acquiring corporation. More specifically, we are asked to construe the Ohio statutes which provide for the compensation payable to such dissenting shareholders, and the case law which has construed such statutes. Before addressing the issues presented for resolution, we will first set forth some of the background on the subject, the pertinent portions of the current, applicable sections of law, and the legislative history of Ohio's and other states' statutes. We will also consider this court's case law as well as the determinations of other Ohio courts on the subject.

In considering the background of the statute at issue, we begin by noting that early corporations more closely resembled the ordinary partnership of today, in that the shareholder usually had a personal financial investment and, more importantly, played a superintending role in the business to protect his investment. Consequently, the courts of that time viewed the relationship between shareholder and corporation as a vested property right, and the vote of a shareholder owning a single share of stock was sufficient, by the common-law rule, to block any merger, sale of major assets or other organic change. [1] Absolute unanimity of all

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1. 12B Fletcher, Cyclopedia of the Law of Private Corporations (1984) 342, Section 5906.1; 2 Hornstein, Corporation Law & Practice (1959) 168, Section 629; Levy, Rights of Dissenting Shareholders to Appraisal and Payment (1930), 15 Cornell L.Q. 420; Lattin, Remedies of Dissenting Stockholders under Appraisal

shareholders was required to effect any fundamental corporate change. The basic theory underlying such rule was that the stockholder had purchased a portion of a going concern, and his approval was necessary to divest him of that which he had purchased.

Tremendous expansion of commerce in the latter part of the nineteenth century created the need for larger, more complex financial structures. As corporations began to merge and otherwise reorganize to meet this need, they encountered the barrier of the minority shareholder backed by the common-law requirement of unanimity. See, e.g., Mason v. Pewabic Mining Co. (1890), 133 U.S. 50, 10 S.Ct. 224, 33 L.Ed. 524 (shareholder objection destroyed the company); In re Timmis (1910), 200 N.Y. 177, 181, 93 N.E. 522, 523 (purchase of a single share to create a strike suit). This rule was, of course, much too restrictive to meet the needs of a growing, modern economy and, thus, corporations began to circumvent this rule by giving dissenters cash payments. In order to prevent excessive costs from upsetting the transaction, courts began to reduce the effect of the rule of unanimity by granting dissenting shareholders the right to recover the cash value of their shares. See, e.g., Lauman v. Lebanon Valley RR. Co. (1858), 30 Pa. 42.

Legislators as well as courts came to view the common-law rule as an obsolete impairment of beneficial corporate interests, or as negating the rights of the majority to exercise control over the corporate affairs to which ownership of their shares entitled them. [2] Ultimately, all states have provided by statute that unanimity is no longer a requisite to approval by the shareholders of such fundamental changes in the corporate structure as merger or sale of assets. See, e.g., Note, Valuation of Dissenters' Stock Under Appraisal Statutes (1966), 79 Harv.L.Rev. 1453; Note, Corporation Law— Dissenting Stockholder's Right of Appraisal— Determination of Value (1953), 28 N.Y. U.L.Rev. 1021; Note, The

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Statutes (1931), 45 Harv.L.Rev. 233, 236-237; Weiss, The Law of Take Out Mergers: A Historical Perspective (1981), 56 N.Y.U.L.Rev. 624, 624-628.

2. See fn. 1, supra. See, also, Horwitz, The Transformation in the Conception of Property in American Law, 1780-1860 (1973), 40 U.Chi.L.Rev. 248; Hills, Consolidation of Corporations by Sale of Assets and Distribution of Shares (1931), 19 Calif.L.Rev. 349; Lattin, Equitable Limitations on Statutory or Charter Powers Given to Majority Stockholders (1932), 30 Mich.L.Rev. 645, 646; Comment, Statutory Merger and Consolidation of Corporations (1935), 45 Yale L.J. 105, 112-113; Small v. Sullivan (1927), 245 N.Y. 343, 357, 157 N.E. 261, 265 (Lehman, J., dissenting); Alpren v. Consolidated Edison Co. (Sup.Ct.1938), 168 Misc. 381, 5 N.Y.S.2d 254.

Dissenting Shareholder's Appraisal Remedy (1977), 30 Okla.L.Rev. 629, 630.

To provide compensation for those shareholders who dissented from the merger, sale of assets, or change in structure decision by the majority, legislative enactments were made across the country. The nearly universal remedy, triggered in various ways, was to provide for an appraisal of the dissenting shareholders' stock, and for the corporation to purchase such stock at the appraised price. See statutes analyzed in Note, A Reconsideration of the Stock Market Exception to the Dissenting Shareholder's Right of Appraisal (1976), 74 Mich.L.Rev. 1023, fn. 2.

Some statutes provide that the court shall appoint a number of appraisers to determine the value of the dissenting shares, subject to limited review by the court and based upon the reasonableness of the appraisal report. [3] Other statutes provide that the trial court has discretion in the appointment of appraisers but must, after hearing all the evidence, inclusive of that of the experts, make its own determination of the value of the stock of the dissenting shareholders. [4] Ohio's statute contains this approach currently, although it should be noted that the predecessor section of law, G.C. 8623-72, provided for a mandatory appointment of appraisers. Furthermore, many jurisdictions, like Ohio, value the stock as of the day prior to the shareholders' vote approving the action. See, e.g., Fla.Stat.Ann. Section 607. 247(3) (1977); Mich.Comp.Laws Ann. Section 450.1768 (1987 Cum.Supp.); Pa.Stat.Ann. Title 15, Section 1515(B) (Purdon, 1987 Cum.Supp.).

A greater divergence of practice exists among states when the issue becomes one of ascertaining the value of the dissenters' shareholdings. This becomes obvious upon an initial perusal of the statutes themselves and their terms which describe the value to be ascertained. Some merely use the term "value," [5] while others utilize "fair value," [6] or

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3. See, e.g., Nev.Rev.Stat. Section 78.510(1) (1986).

4. See, e.g., Ala.Code Title 10, Section 10-2A-163 (1975); Idaho Code Section 30-1-81 (1980); N.H.Rev.Stat.Ann. Section 293-A:82 (1986 Cum.Supp.); Vt.Stat.Ann. Title 11, Section 2004(e) (1984); Wis.Stat.Ann. Section 180.72(6) (1986 Supp.). See, also, Del.Code Ann. Title 8, Section 262(c) (1983) (court hears exceptions to appraiser's report).

5. See, e.g., Del.Code Ann. Title 8, Section 262(f) (1983) (used interchangeably with "fair value"); Kan.Stat.Ann. Section 17-6712 (1986 Cum.Supp.).

6. See, e.g., Ala.Code Title 10, Section 10-2A-163 (1975); Fla.Stat.Ann. Section 607.247 (1977); Idaho Code Section 30-1-81 (1980); Ark.Stat.Ann. Section 64-

"fair cash value."[7] Moreover, the statutes vary according to what is meant by such terms and the analytical approach required to obtain the final valuation for the stock. A number define their statutory term as referring to the stock market value,[8] when the stock is traded upon a national securities exchange[9] or, more specifically, traded upon the New York Stock Exchange. Otherwise, an appraisal is required.

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707 (1980); Iowa Code Ann. Section 496A.78 (1962); Minn.Stat.Ann. Section 302A.473 (1985); Me.Rev.Stat.Ann. Title 13-A, Section 909(1) (1981); N.H.Rev.Stat.Ann. Section 293-A:82 (1986); Vt.Stat.Ann. Title 11, Section 2004(e) (1984); Wis.Stat.Ann. Section 180.72(6) (1986 Supp.); ALI-ABA Model Bus. Corp. Act Section 81 (1969); Rev. Model Business Corp. Act Section 13.01 (1984).

7. See, e.g., Nev.Rev.Stat. Section 78-510 (1986); R.C. 1701.85. See, also, Henn & Alexander, Corporations (3 Ed.1983) 1002, Section 349.

8. See cases collected in Note, A Reconsideration of the Stock Market Exception to the Dissenting Shareholder's Right of Appraisal (1976), 74 Mich.L.Rev. 1023, 1024, fn. 4.

9. In Section 80b-2(a), Title 15, U.S.Code, the term "national securities exchange" is defined as a securities exchange registered as a national securities exchange under the Securities Exchange Act of 1934. Any exchange may be registered with the Securities and Exchange Commission as a national securities exchange by filing a registration statement with the Commissioner. Section 78f(a), Title 15, U.S. Code. Most stock-market exception statutes require that the stock be listed on a national securities exchange in order to invoke the exception. See, e.g., Ariz.Rev.Stat.Ann. Section 10-080(C) (1977); Deering's Cal.Corp.Code Ann. Section 1300(b)(1) (1987 Supp.); Del.Code Ann. Title 8, Section 262(b) (1983); Fla.Stat.Ann. Section 607.244 (1987 Cum.Supp.); Ga.Code Ann. Section 22-1201 (1987 Cum.Supp.); Iowa Code Ann. Section 496A.77 (1987 Cum.Supp.); Kan.Stat.Ann. Section 17.6712(k) (1974); Md.Ann.Code, Corporations & Associations, Section 3-202(C) (1986 Cum.Supp.); Mich.Comp.Laws Ann. Section 450.1762 (1973); N.J.Stat.Ann. Section 14A:1[illegible]1 (1987 Cum.Supp.); R.I.Gen.Laws Ann. Section 7-1.1-73 (1985); Va.Code Ann. Section 13.1-730(C) (1987 Cum.Supp.); Wis.Stat.Ann. Section 180.725 (1986 Supp.). Statutes in Maine and Tennessee state that the exception applies to stocks traded on " 'national securities exchange' as defined under the Securities Exchange Act of 1934, as amended" or "Registered with the Securities and Exchange Commission pursuant to section 12(g) of * * * the Securities Exchange Act of 1934." Me.Rev.Stat.Ann. Title 13-A, Section 908(4)(B) (1981); Tenn.Code Ann. Section 48-1-909(c) (1984). Instead of using "national securities exchange," Georgia, Pennsylvania and Utah specify the New York Stock Exchange or the American Stock Exchange, Ga.Code Ann. Section 22-1201 (1987 Cum.Supp.); Pa.Stat.Ann. Title 15, Section 1515(L) (Purdon, 1987 Cum.Supp.); Utah Code Ann. Section 16-10-75 (1987).

Many states depend upon an appraisal proceeding, either by statute or through an alternative equitable proceeding. Such a proceeding attempts to ascertain the value of the dissenting shareholders' stock by analysis of: intrinsic value; net asset value; going concern value; liquidation value; net equity value; earnings value of the stock or dividends prospects; the nature of the enterprise and its relative position within the particular industry; post-merger gains or synergistic gain; tax benefits to all concerned; rescission and/or equitable concerns. A state may utilize all of the above factors, at least in theory, or some lesser combination of them. [10] Quite often courts rely upon three principal elements in arriving at the value of the shares of dissenting shareholders, i.e., net asset value, market price of the stock on the New York Stock Exchange and the earnings value (future) of the corporation. This method is commonly referred to as the "Delaware Block" analysis and allows a trial court to weigh each element by imposing a multiplier and then rendering an average value. See In re General Realty & Utilities Corp. (1947), 29 Del.Ch. 480, 52 A.2d 6; Weinberger v. UOP, Inc. (Del.1983), 457 A.2d 701; Appraisal Remedy, supra (38 Sw.L.J.), at 779, fn. 10. All of these approaches to a determination of value of the shares of the dissenting shareholders may be appropriate under the specific requirements of a state statute, giving consideration to the salient facts surrounding a given corporate entity.

In determining the present case, we must look to Ohio's statutory procedures for determining the amount to be paid to dissenting shareholders. In the light of such statutes we shall analyze the specific circumstances of this corporate merger, including the point in time of such merger, and the evidence or indicia of the value of such stock which existed at that time. Also, we must look to this court's interpretation of such law, and any activity by the General Assembly in this specific area of the law. The primary statute with which we are concerned is R.C. 1701.85. The predecessor section of law, G.C. 8623-72, provided, as does the current section, for the payment of the fair cash value to a shareholder for his shares as of the day prior to the vote of the shareholders. It also required, as does the current section, that any

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10. See, e.g., Coleman, Appraisal Remedy in Corporate Freeze-Outs: Questions of Valuation and Exclusivity (1984), 38 Sw.L.J. 775; Brudney & Chirelstein, Fair Shares in Corporate Mergers and Takeovers (1974), 88 Harv.L.Rev. 297; Brudney & Chirelstein, A Restatement of Corporate Freezeouts (1978), 87 Yale L.J. 1354; but, cf., Toms, Compensating Shareholders Frozen Out in Two-Step Mergers (1978), 78 Colum.L.Rev. 548, 552, fn. 12.

appreciation or depreciation in consequence of such action must be excluded from the determination of the fair cash value of the stock.[11]

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11. R.C. 1701.85 provides: "(A)(1) A shareholder of a domestic corporation is entitled to relief as a dissenting shareholder in respect of the proposals in sections 1701.74, 1701.76, and 1701.84 of the Revised Code, only in compliance with this section. "(2) If the proposal must be submitted to the shareholders of the corporation involved, the dissenting shareholder shall be a record holder of the shares of the corporation as to which he seeks relief as of the date fixed for the determination of shareholders entitled to notice of a meeting of the shareholders at which the proposal is to be submitted, and such shares shall not have been voted in favor of the proposal. Not later than ten days after the date on which the vote on such proposal was taken at the meeting of the shareholders, the shareholder shall deliver to the corporation a written demand for payment to him of the fair cash value of the shares as to which he seeks relief, stating his address, the number and class of such shares, and the amount claimed by him as the fair cash value of the shares. " * * * "(B) Unless the corporation and the dissenting shareholder shall have come to an agreement on the fair cash value per share of the shares as to which he seeks relief, the shareholder or the corporation, which in case of a merger or consolidation may be the surviving or the new corporation, within three months after the service of the demand by the shareholder, may file a complaint in the court of common pleas of the county in which the principal office of the corporation which issued such shares is located, or was located at the time when the proposal was adopted by the shareholders of the corporation, or, if the proposal was not required to be submitted to the shareholders, was approved by the directors. * * * On the day fixed for the hearing on the complaint or any adjournment of it, the court shall determine from the complaint and from such evidence as is submitted by either party whether the shareholder is entitled to be paid the fair cash value of any shares and, if so, the number and class of such shares. If the court finds that the shareholder is so entitled, the court may appoint one or more persons as appraisers to receive evidence and to recommend a decision on the amount of the fair cash value. The appraisers have such power and authority as is specified in the order of their appointment. The court thereupon shall make a finding as to the fair cash value of a share, and shall render judgment against the corporation for the payment of it,with interest at such rate and from such date as the court considers equitable. * * * "(C) If the proposal was required to be submitted to the shareholders of the corporation, fair cash value as to those shareholders shall be determined as of the day prior to that on which the vote by the shareholders was taken, and, in the case of a merger pursuant to section 1701.80 or 1701.801 of the Revised Code, fair cash value as to shareholders of a constituent subsidiary corporation shall be determined as of the day before the adoption of the agreement of merger by the directors of the particular subisdiary corporation. The fair cash value of a share for the purposes of this section is the amount that a willing seller, under no compulsion to sell, would be willing to accept, and that a willing buyer, under no compulsion to purchase, would be willing to pay, but in no event shall the fair cash value exceed the amount

The prior section of the General Code did not include a definition of "fair cash value." Accordingly, this court, in Roessler v. Security Savings & Loan Co. (1947), 147 Ohio St. 480, 34 O.O. 389, 72 N.E.2d 259, defined the term in the first paragraph of the syllabus, as follows:

"The 'fair cash value' which a dissenting shareholder in a corporation is entitled to receive for his shares in a proceeding brought pursuant to Section 8623-72, General Code, is the intrinsic value of the shares determined from the assets and liabilities of such corporation, upon consideration of every factor bearing on value." (Emphasis added.)

This court, in Roessler, further found that the trial court had erred in instructing the appraisers that "fair cash value" meant a sum equal to that at which a willing buyer would purchase stock from a willing seller, i.e., the "market value" of such stock. It was then determined that such instruction was prejudicial to the stockholder, in that market value may be less than the intrinsic value of the stock. Subsequently, and by what has been termed a response to Roessler, the General Assembly enacted R.C. 1701.85(C), effective October 11, 1955 (126 Ohio Laws 432, 485), which provided for the definition of "fair cash value" as the willing seller-willing buyer test.

Significantly, the Comment of the Ohio State Bar Association Committee which recommended the addition of the definitions to this section, stated:

"Division (C). This division contains a frequently used definition of 'fair cash value.' This definition is one that is found in a great mass of judicial decisions both in Ohio and elsewhere, in litigation involving the value of property, in appropriation suits, tax controversies, and other legal proceedings in which property must be valued. It is believed that this definition will give the Bar a clearer test than that of 'intrinsic value' established by the Supreme Court in Roessler v. Security Savings & Loan Co., 147 O.S. 480 (72 N.E.2d 259)." 28 Ohio Bar 102 (Jan. 10, 1955).

Since the adoption of division (C) in R.C. 1701.85, this court has had no opportunity to discuss the meaning and application of the willing seller-willing buyer definition to the words "fair cash value" in the

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specified in the demand of the particular shareholder. In computing such fair cash value, any appreciation or depreciation in market value resulting from the proposal submitted to the directors or to the shareholders shall be excluded."

valuation of the shares of dissenting shareholders.[12] However, a number of Ohio cases in the courts of appeals involved the interpretation of such words within R.C. 1701.85. The Court of Appeals for Franklin County considered the meaning of such terms in Vought v. Republic-Franklin Ins. Co. (1962), 117 Ohio App. 389, 24 O.O.2d 168, 192 N.E.2d 332. That court determined the manner by which, under the new definition, the dissenter's stock should be valued. The case apparently involved an appraisal of shares held by the dissenting shareholders of Republic-Franklin Insurance Company, which company's stock was not being traded upon any stock exchange. The dissenting shareholders in Vought argued that the willing buyer-willing seller standard may not apply where there are no market transactions from which to gain this data. In such an instance, they argued, the standard of valuation would be the "intrinsic value."

The court, however, held that the adoption of R.C. 1701.85,including its definition of fair cash value, "was a legislative overruling of the holding of the Roessler case by a deliberate adoption of the hypothetical market value standard, and that standard is applicable to the valuation of shares held by dissenting shareholders regardless of the existence or nonexistence of comparable sales in a suitable existing actual market." Id. at 391, 24 O.O.2d at 169, 192 N.E.2d at 334. "Such a standard generally will permit evidence to be introduced as to any factor which a reasonable man would take into consideration in determining value. Actual market conditions are, therefore, open to proper interpretive evidence." Id. at 391, 24 O.O.2d at 169, 192 N.E.2d at 333.

In Vought the court pointedly set forth its recognition of the appropriate factors to be considered in other situations where the active market trading of the shares of the corporation was involved. The court stated that: "(u)nder some conditions certain types of evidence may be so persuasive as to be entitled to a legally preferred status, and other evidence could become too speculative. If a sufficient actual market existed for identical items, in which active trading was occurring, such evidence might be controlling, and other methods of evidencing value (for example, original cost or capitalization of earnings) may be excludable. This point

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12. At present, Ohio, together with a small but growing minority of other states, defines the value of a share by the willing buyer-willing seller test. Obviously, market price of the stock is the focus of such valuation. See, e.g., Ga.Code Ann. Sections 22-1201 and 1202.

would probably be true in most cases involving the valuation of stock which is actively traded on the New York Stock Exchange." Id.

Following the Vought case, the same court of appeals had further occasion to discuss and interpret the language of R.C. 1701.85(C) in Parten v. Pure Oil Co. (July 1, 1969), Franklin App. No. 9023, unreported. The author of the opinion in the case sub judice was also the author of the Parten opinion. In Parten, the court stated: "We hereby adopt and apply this philosophy as set forth in the Vought case to the cause before this court.

"As reasonably stated in Vought, 'in the absence of a suitable actual market, valuation is difficult and the evidentiary problem can become very complex.' However, where there is in fact a presence of such suitable actual market for the identical stock to be appraised, such evidence should be controlling.

"If the actual market is deemed to be sufficiently active in its trading of the particular stock in question, then, giving substantial weight to such factor does no violence to the willing seller, willing buyer (hypothetical market) theory.

"Such actual market price would in fact be the willing seller, willing buyer amount dictated by the statute. From such amount, of course, there must be excluded either appreciation or depreciation, if either is found to be present as a result of the proposal acted upon by the shareholders." Id. at 17.

In *Parten*, on a review of the evidence that had been before the appraisers and the trial court, the appellate court held that there was "a sufficiency of activity in the market for Pure (Oil) shares, and that the time relationship of such activities on the New York Stock Exchange on the date in question of July 1, 1965, constituted a sufficient market in which such trade was in fact occurring." Id. The court stated that "the evidence of the actual market price as to be found upon the Stock Exchange, should have been so persuasive as to be given a preferred status over the other information and data related to asset value, going concern value, etc., in determining the 'willing seller, willing buyer' fair cash value of such stock on the appraisal date as provided by the statute." Id. at 21.

There are several rationales which support the analyses set forth in Vought and Parten, supra. Generally, modern shareholders do not purchase stock as entrepreneurs who closely scrutinize or take an interest in corporate operations, but instead seek assured incomes and long-term

appreciation of their investment.[13] As one commentator has stated: "(I)n substantially every case other than (those) related to control, the owner of shares of a company listed on a national securities exchange regards himself as an investor in those securities, rather than as a part of the corporate enterprise. The investor's objective is not to promote the income of the corporation but to enhance his distributive share, not to increase the corporate assets but to enhance the value of his securities. Since the measurement of these objectives is provided by the exchanges ... dissent and appraisal no longer (should be) required."[14] (Emphasis added.) Moreover, the purchaser of shares makes, at most, only a limited commitment to the kind of large corporation that has widely traded stock. The usual investor has never sought the assets of the corporation or access to control of its operations. It is therefore most unreasonable to attempt to value a share of stock, held by a dissenting shareholder, utilizing valuation techniques oriented upon inner-corporate functions and property holdings of which the shareholder had little if any knowledge at the time he purchased the stock.

Nor can we fail to notice that the kind of appraisal procedures which utilize the various aforementioned approaches to valuation are most expensive. Such approaches invariably create the spectacle of considerable sums being spent to haul thousands of documents and numerous, but often contradictory, expert opinions into court to be analyzed by a trial judge who may have only a limited frame of reference in such matters. Furthermore, many of such documents are internal and/or of a confidential nature, as in the record before us, revealing ordinarily hidden assets and valuations. As previously mentioned, such knowledge was largely unknown to the shareholder at the time he purchased his stock. Consequently, it formed little or no part of his decision to purchase the stock or, indeed, to dissent from the tender offer and merger. On the other hand, a great number of studies have shown that stock exchanges, such as the New York Stock Exchange, have a reasonably efficient market.[15]

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13. See, e.g., Hurst, The Legitimacy of the Business Corporation in the Law of the United States 1780-1970 (1970).

14. See fn. 8, supra, Note, at 1029, quoting Scott, Changes in the Model Business Corporation Act (1968), 24 Bus.Law 291, 303. Also, business decisions are more often unaffected by the desires of shareholders. See, e.g., 2 Davis, Corporations (1961) 272-274.

15. See, e.g., Ball & Brown, An Empirical Evaluation of Accounting Income Numbers (1968), 6 J. of Acc. Res. 159 (found that most information contained in annual earnings announcements is anticipated by the market before the actual

meaning that the market price of a share will ordinarily fluctuate in random fashion within a range quite near the actual value of the stock.[16]

By utilizing the stock market price as the beginning point of analysis in cases such as those before us now, a great many advantages will result to shareholders and corporations alike. One obvious benefit is that the scope of analysis is fairly narrowed such that the parties may, to a reasonable degree, predict the outcome of the proceedings. Pre-appraisal settlement then becomes the better alternative to litigation. The harassment potential inherent within an appraisal remedy as well as vexatious lawsuits (by those whose real goal is simply to receive more money for their stock) will, under the within clarified standard, become much more unlikely. Further, costs to all shareholders will be ultimately reduced by this more straightforward proceeding.

The dissenting shareholder will bear fewer costs to exercise his legal rights since the scope of discovery and concomitant courtroom presentations will be lessened. Also, the costs to the majority shareholders will decrease since less corporate funds will go toward participation in the appraisal proceeding. Finally, a less complicated valuation proceeding will advance the goal of streamlining corporate reorganizations and, at the same time, protect the liquidity and value of the dissenting shareholder's stock.

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report is released); Crouch, A Nonlinear Test of the Random-Walk Hypothesis (1970), 60 Am.Econ.Rev. 199 (serial correlation tested five NYSE stocks for special conditions and found independence in pricing); Fama & Blume, Filter Rules and Stock Market Trading (1966), 39 J. of Bus. 226 (application of filter rules to the DJIA stocks found independence in price behavior); Fama, Fisher, Jensen & Roll, The Adjustment of Stock Prices to New Information (1969), 10 Intl.Econ.Rev. 1 (study of stock splits on the NYSE supports efficiency theory since the market makes an unbiased forecast of the implications of the split for future dividends); Granger & Morgenstern, Spectral Analysis of New York Stock Market Prices (1963), 16 Kyklos 1 (use of spectral analysis found independence in prices in stocks in Standard & Poor's Industrial Index), discussed in Baumol, The Stock Market and Economic Efficiency (1965) 40- 41; Mandelker, Risk and Return: The Case of Merging Firms (1974), 1 J. of Finan.Econ. 303 (market discounts news of merger many months in advance); Scholes, The Market for Securities: Substitution versus Price Pressure and the Effects of Information on Share Prices (1972), 45 J. of Bus. 179 (study of secondary distributions found that market anticipates information implicit in the offering).

16. See, e.g., Cootner, The Random Character of Stock Market Prices (2 Rev.Ed.1967); Mandelbrot, Forecasts of Future Prices, Unbiased Markets, and "Martingale" Models (1966), 39 J. of Bus. 242; Lorie & Hamilton, The Stock Market: Theories & Evidence (1973) 75-80.

Having established the accuracy and desirability of the stock market price as an initial value in cases such as the one before us, it must now also be pointed out that the statute requires that any effects of the subject transaction which are caused by either appreciation or depreciation of the market price must be removed from such price. [17] Admittedly, merely adopting the market price established by the trading activity on the day before the vote to initiate the merger may not suffice to fully eliminate such effects. [18] However, Ohio's statutory mandate is sufficiently broad to allow inquiry into such factors as may have created a price disparity. The valuation remedy clearly is a remedy that does not give dissenting shareholders any element of value attributable to the transaction from which they have dissented. On the other hand, any factors relating to the merger which have artificially depressed the stock's price ought not to create a windfall for the tenderer at the expense of the dissenter.

Certainly prices of the stock which prevailed before the market began to adjust for the impending merger would constitute valuable evidence. This approach is currently utilized in prosecutions under Rule 10b-5 (Section 240.10b-5, Title 17, C.F.R.) (fraud on the market) where the fraudulent transaction is measured by the difference between the market price paid for the shares fraudulently obtained and that market price adjusted for the appreciation or depreciation created by the fraudulent practice. Moreover, such prosecutions presume not only that the market efficiently incorporates information into the price but also that the price otherwise reflects value. See, e.g., Blackie v. Barrack (C.A.9, 1975), 524 F.2d 891, certiorari denied (1976), 429 U.S. 816, 97 S.Ct 57, 50 L.Ed.2d 75; Jennings & Marsh, Securities Regulation: Cases and Materials (1982) 1186.

Based upon the foregoing, we believe that the applicable law stated within Parten v. Pure Oil Co. may be applied here. Furthermore, the later amendments to the dissenting shareholder statute, R.C. 1701.85, particularly the addition of the terms, willing buyer-willing seller, permit the dissenting shareholders to elect to receive, in lieu of the tender consideration, that amount which their shares would have brought on the market at the time of the merger, had the transaction dissented from never

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17. R.C. 1701.85(C) provides, in pertinent part, that: "In computing such fair cash value, any appreciation or depreciation in market value resulting from the proposal * * * shall be excluded."

18. See, e.g., Mandelker, Risk and Return: The Case of Merging Firms (1974), 1 J. of Finan. Econ. 303.

occurred. The evidence adduced at the trial herein showed that there was considerable trading of Marathon stock on the New York Stock Exchange. The record before us indicates that from November 2, 1981 until March 10, 1982, the date of the shareholders' vote, 35,211,100 shares of Marathon stock had been traded on the Exchange. The trial court noted in its opinion that "(i)f we consider that Marathon had 56,689,306 shares outstanding on March 10, 1982, 62.112% of such shares (was) traded." Concerning the sale price of the Marathon stock during this period, the court noted that: "The high during that period was 108 1/8 and the low was 70 3/4 ." The stock actually closed at 75 3/4 on March 10, 1982.

The trial court, in viewing the market activity of the Marathon stock upon the Exchange, concluded that R.C. 1701.85, and the case law available, would require it to give due emphasis, if not controlling emphasis, to the market price rather than to a theoretical market value based upon an analysis of various factors including the assets of the corporation. The court of appeals rejected the trial court's analysis on this point. It held that: "(W)hat is to be valued is not the value of a single share if it were to be sold in an isolated sale, but instead the value per share of all the shares of the corporation, which can be determined only upon the basis of a hypothetical market or sale of all the shares of the corporation."

We conclude that the court of appeals mistakenly viewed the intent and meaning of the words of the statute as well as the holdings of both Vought and Parten. The view that fair cash value must be determined by calculating a pro-rata share of a constructed or hypothetical purchase price for the entire corporation where there is an actual market for the stock of the company particularly when the stock is actively traded is simply incorrect.

As held in Vought, and emphasized in Parten, the Ohio statute provides for the willing seller-willing buyer standard, which is the market value definition. It should be applied whenever the indicia of significant market trading is manifest. Also, evidence of such market activity and price should be of greatest significance and weight.

The statutory scheme of R.C. 1701.85 was established to enable courts and their advising appraisers to determine not only the value of actively traded stock, as in the case sub judice, but also the value of closely held stock in privately or closely held corporations, which stock has little, or no, over- the-counter trading activity. In the latter instances, the trial court and the appraisers would have no analysis of market activity to apply. Under such circumstances, they may well apply the so-called

hypothetical market valuations to the dissenters' shares. In so doing, the court may utilize all acceptable accounting principles including asset value, capitalization of earnings, dividend returns, management, potential growth of corporate endeavor or product, as well as other acceptable criteria. However, where a reasonably sufficient actual market does exist, there is no need to construct a hypothetical market.

As noted, the court of appeals held that the fair cash value must be determined upon the basis of a sale of "all or substantially all" of the shares of the corporation, not just upon the determination of value of "a single share" of the corporation. We believe this to be incorrect. As the court in Parten noted, "(t)he statute requires that the appraisal of the fair cash value be for a share of the stock appraised." (Emphasis sic) Id. at 20. The relief being sought by the dissenting shareholder is "payment to him of the fair cash value of the shares as to which he seeks relief. * * * " R.C. 1701.85(A)(2). It is therefore readily apparent, from the wording of the statute itself, that the determination of value to be made is of the value of those shares held by the dissenting shareholders who opted not to join with the other shareholders in approving the corporate action of merger or other basic structural change. There is no reason to consider, nor is the dissenting shareholder entitled to receive, any of the premium value offered as consideration to those who in fact tendered their shares.

We determined that, in applying its "all, or substantially all" approach to determine fair cash value of the dissenting shareholders, the court of appeals also improperly considered the $125 per share offered by U.S. Steel in the mid-November tender offer which was for fifty-one percent of Marathon's stock. This amount must reasonably be considered as a premium offer, made to enable U.S. Steel to acquire the controlling stock in Marathon. Further, by its terms, this premium offer was to be apportioned only among the accepting shareholders and was not to pertain to the other shareholders. We now hold that where there is considerable stock market indicia upon which to rely for the determination of fair cash value, the amount tendered to obtain the controlling interest of the corporation is not properly includable in the determination.[19] Thus, as the Supreme Court of Oklahoma noted in Foglesong v. Thurston Natl. Life Ins. Co. (Okla.1976), 555 P.2d 606, 611: "The purchase of stock to gain

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19. See Easterbrook & Fischel, Corporate Control Transactions (1982), 91 Yale L.J. 698, 708-711; Toms, supra (78 Colum.L.Rev. 548), at 556 (tender offer bid is product of bargaining); Henry, Activities of Arbitrageurs in Tender Offers (1971), 119 U.Pa.L.Rev. 466, 469 (risk that merger may fail is borne by arbitrageur).

controlling interests is not properly includable in determining the market value of the shares of stock, and the court may take judicial notice of the fact that acquisition of stock to acquire control is frequently made at premium prices." (Footnote omitted.) See, also, In re Valuation of Common Stock of Libby, McNeill & Libby (Me.1979), 406 A.2d 54, 58, fn. 3 (noting that tender offers frequently, if not usually, involve premiums in excess of current market price); Gibbons v. Schenley Industries, Inc. (Del.Ch.1975), 339 A.2d 460, 468 (based upon the statutory proceeding).

In determining the "fair cash value" of shares held by dissenting shareholders under R.C. 1701.85, the inquiry should first focus upon the degree of sales activity of such stock upon the major exchanges, then the activity if any upon the smaller exchanges, or over-the-counter sales. If there is found to be significant activity upon any of these markets, then a court should focus upon the subject stock's trading activity as a benchmark for the willing seller-willing buyer standard. It is our belief that the legislative amendments intended that where market activity is significant, that market's price should be utilized. With proper adjustments for the impact of the proposed transaction dissented from, such market price will allow the dissenter to exit the market in basically the same manner, and by the same terms, as he entered.

As to the adjustments to the market price to accommodate any appreciation or depreciation present in that price because of the pendency of the proposed merger, as required by R.C. 1701.85(C), the trial court found that its determination of "fair cash value does not include any 'appreciation,' which is to say, enhancement of the value of Marathon stock. * * * " Marathon argues here that the correct applicable valuation date was March 10, 1982, and that although the stock market value of a Marathon share of stock on this date was $75.75, there was significant evidence that the price was appreciated due to the U.S. Steel merger offer.

The record shows that from January 1, 1981 to October 29, 1981, Marathon's stock price had, in what one witness termed "a horrendous bear market," a range from a low of $46.125 on May 26, 1981 to a high of $79.75 on August 13, 1981. Moreover, the average price over the same period was some $60 per share. On October 29, 1981, Marathon stock closed at $63.75 on a volume of 369,100 shares. Mobil submitted the tender offer to purchase up to sixty-seven percent of Marathon stock for $85 per share on October 30, 1981. Marathon stock traded on the Exchange at $90 on November 2, 1981. The price then ranged downward until it reached $77 per share on November 18, 1981, which was the date

issues yet to be determined and may present any new evidence upon such issues as has not already been placed within the record.

IV

Appellant Harrell asserts that the trial court's refusal to grant a jury trial upon the issue of fair cash value was violative of Section 5, Article I of the Ohio Constitution, which states, in pertinent part: "The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three- fourths of the jury." Appellant also points to R.C. 2311.04 which provides that: " * * * Issues of fact arising in actions for the recovery of money only, * * * shall be tried by a jury * * *." The scope of such statute is certainly no greater than the constitutional provision. (13)

In contrast to appellant's claim, R.C. 1701.85(B) provides that: "The court thereupon shall make a finidng as to the fair cash value of a share, and shall render judgment against the corporation for the payment of it * * *." (Emphasis added.) Quite clearly, this provision dispenses with the requirement of a jury trial and requires that the finding be made by the trial court, with or without the aid of an appointed appraiser.

Furthermore, the law of Ohio has, for some time, been that the constitutional provision for a right to jury trial applies only where trial by jury existed at common law. As early as 1799, the territorial legislature established special proceedings to ascertain value to be paid where otherwise a money damages action would lie. See Willyard v. Hamilton (1836), 7 Ohio 398. In Willyard, the precise argument as presented in the case sub judice was set forth as an objection to the statutory grant of power to a board of commissioners to determine valuation. In commenting on the applicability of Ohio's constitutional protections for a right to jury trial, the court made the following observations:

" * * * Perhaps there is no constitutional question which has ever been discussed in this country, which has been so completely settled by contemporaneous construction and universal acquiescence. On what principle is it that juries are dispensed with in the greater number of our courts, in courts of equity, courts of admiralty, courts martial, and courts of justices of the peace. Magna charta declares that no man shall be deprived of life, liberty, or property, but by the judgment of his peers, or the law of the land. * * * (A)s juries were unknown in those courts before the great charter, their disuse constituted a part of the law of the land; and, therefore, although that charter was the first great instrument which solemnly guaranteed jury trial to Englishmen, yet it has never been

supposed that that institution constituted a part of the machinery of those courts. * * *

"The provision in magna charta, which I have referred to, is transcribed into the ordinance, omitting only the word life. And if the last six articles of this instrument are of perpetual obligation, then we have in Ohio the same law and the same course of proceeding as in England, and very nearly the same as in the other states of the Union. If the law were otherwise, no courts would have time sufficient to try the infinite multitude of actions which would arise. * * * " (Emphasis sic.) Id. at 402-403.

In a subsequent case, Belding v. State ex rel. Heifner (1929), 121 Ohio St. 393, 169 N.E. 301, Ohio's General Assembly had provided that, in parentage determinations, the trial court was to determine the amount payable as child support, maintenance, etc. G.C. 12123, as amended April 30, 1923. In considering whether the statute violated the Ohio Constitution, this court stated that:

"It was not, however, the intention of the framers of that clause * * * to guarantee the right of trial by jury in all controversies. That guaranty only preserves the right of trial by jury in cases where under the principles of the common law it existed previously to the adoption of the Constitution. The right of trial by jury has uniformly been recognized and enforced in this state in actions for money, where the claim is an ordinary debt, but it is equally well recognized that many special proceedings for the enforcement of a moral duty, where the payment of money is the ultimate relief granted, does (sic) not entitle the parties to a jury trial. * * * " Id. at 396-397, 169 N.E. at 302.

It becomes clear that the special proceeding established by R.C. 1701.85, providing for valuation of shares by the trial court, need not require the participation of a jury. Obviously such valuations are most similar to those kinds of proceedings which were exempt at common law. Accordingly, we find that the General Assembly did not violate the Ohio Constitution by its creation of the valuation proceeding under R.C. 1701.85.

V

R.C. 1701.85(B) provides that following a determination of fair cash value of the dissenters' stock, the trial court "shall render judgment against the corporation for the payment of it, with interest at such rate and from such date as the court considers equitable." At trial, the court applied an interest rate of eight percent based upon R.C. 1343.01(A), which the

U.S. Steel made its offer. The stock went up following such offer to $104.25 on November 19, 1981. It stayed at a little over $100 until December 12, 1981 when the stock began to decline to the mid $70s. The closing price, as stated, on March 10, 1982, was at $75.75.

The mandate of R.C. 1701.85 is that any appreciation or depreciation in market value resulting from the proposal submitted to the directors or to the shareholders shall be excluded. The above review of the average of the stock market prices of Marathon stock between the date of the U.S. Steel proposal and the date of the shareholders' vote, i.e., between November 18, 1981 and March 10, 1982, would indicate that there had not been significant appreciation in such prices. Any fluctuation was apparently due to normal willing seller-willing buyer activity. The trial court so found and denied any appreciation factor in its fair cash price determination.

However, as stated, Marathon argues that there was a demonstrated appreciation of the stock here, which should be factored in by the trial court. Marathon argues that the opportunity and prospect of Marathon stock purchasers' receiving a note, then valued at slightly more than $76, for each share of their stock, caused the market price of Marathon's shares to stay near that level. Data offered by Marathon's expert witnesses showed that Marathon's stock, absent the merger offer, would have returned to the range of other comparable oil producing corporations which, it was shown, declined in price by approximately thirty percent in that same period. It was testified that, absent the prospect of exchanging stock for notes, Marathon's stock would have fallen below $50 per share, being adjusted to reflect the market and company outlook during the period of October 1981 to March 10, 1982. (5)

Based upon all of the evidence presented, we hold that the trial court should have first established the correct date for the valuation of the stock, i.e., March 10, 1982. Second, all factors concerned with, or reasonably affecting, any appreciation of the stock should have been reviewed and decided by the trial court. Accordingly, this matter is reversed and the cause is remanded to the trial court for the limited determination of what appreciation or depreciation, if any, existed due to the U.S. Steel proposal submitted to the Marathon shareholders.

II.

As previously mentioned, appellee, Frances A. Armstrong, made demand for fair cash value upon Marathon in her own name and also in the individual names of various members of the Marathon Shareholders

Committee. She signed the demand letters as attorney in fact and delivered them on March 22, 1982. The demand letters so executed were filed within the ten-day period prescribed by R.C. 1701.85(A)(2) which, in pertinent part, requires that: "Not later than ten days after the date on which the vote on such proposal was taken * * *, the shareholder shall deliver to the corporation a written demand for payment to him of the fair cash value of the shares as to which he seeks relief * * *." Approximately three weeks later, Armstrong provided evidence of her power of attorney to act for the above shareholders.

Prior to trial, Marathon moved for summary judgment against the above shareholders asserting that their demand letters were untimely because no proof of the existence of Armstrong's power of attorney was provided until after the ten-day limitation had expired. The trial court agreed, upon authority of Klein v. United Theaters Co. (1947), 148 Ohio St. 306, 35 O.O. 298, 74 N.E.2d 319, and its third syllabus paragraph which states, in pertinent part, that a shareholder has failed to comply with the statutory demand requirements if he "did not personally make an objection in writing to the corporation and demand the fair cash value of his shares, and the only written objection and demand on behalf of the shareholder was made by an agent who was a stranger to the corporation and furnished no proof of his authority or agency, although the shareholder did not vote in favor of the sale." (Emphasis added.) Also, it was stated in Klein "that such written authority must be displayed to or filed with the corporation within the time limited." Id. at 324, 35 O.O. at 305, 74 N.E.2d at 327.

The court of appeals determined that neither the statute nor the language of Klein required proof of a power of attorney to be presented or displayed to the corporation within the ten-day period. Although we hold that the principles of law as set forth in Klein are valid, generally requiring that proof of an agency relationship be submitted within the ten-day period, we nevertheless conclude that where the agent is not a stranger to the corporation, such principles may not be applicable. In this regard, there are several factual distinctions between the case here and Klein. Furthermore, because there are several rationales underlying Klein which are not applicable to the case sub judice, we find that Klein is not determinative of this case.

As previously mentioned, and also as pointed out in Klein, at common law a single shareholder could, by his vote, entirely block a merger or liquidation of assets. Id. at 317, 35 O.O. at 303, 74 N.E.2d at 324-325. Ordinarily, it is the rule that statutes in derogation of the common

law are to be strictly construed. This rule would more properly apply to the statutory provisions which strip the shareholder of his power to block the transaction, and not those which, by way of exchange, grant him the right to cash out his stock at a fair price. Of course, very little is to be gained by strictly construing the statute against the dissenting shareholders especially since, in the historical development of corporations, prior law allowed individual shareholders to exercise more power. Therefore, those provisions which regulate the powers of shareholders need only be as strictly construed as modern economic necessity would dictate and/or the General Assembly might specifically require.

Admittedly, the use of a proxy by an agent of the shareholder is in derogation of the common law since "(t)he right to vote at meetings (formerly could not) be delegated." Id. at 319, 35 O.O. at 303, 74 N.E.2d at 325. Currently, however, the right to utilize the services of an agent to vote one's shares or otherwise exercise the power of a shareholder is granted by R.C. 1701.48(A) which provides in pertinent part that shareholders "may be represented at (a shareholders') meeting or vote thereat, and execute consents, waivers, and releases, and exercise any of his other rights, by proxy or proxies appointed by a writing signed by such person." (Emphasis added.)

The only relevant portion of this statute amendable to a strict construction is the manner in which such agency relationship is to be established, i.e., by an executed writing granting such power as is intended, and also, by direct inference, that such writing be executed before the exercise of the power conferred. This, of course, was quite correctly determined in Klein, supra, at 324, 35 O.O. at 305, 74 N.E.2d at 327. On the other hand, the issue of when such authority ought to be displayed to the corporation is not comprehended by the statute and, thus, should not be subjected to a strict statutory or other construction. Whether the exercise of power granted ought to be narrowly or broadly viewed regarding the timing issue is properly determined from the necessities and practicalities of corporate legal circumstances.

An example of when the power of attorney or proxy should be displayed prior to its exercise is demonstrated by those circumstances and legal implications of voting the shares of stock. For quite obvious reasons, voting of stock must be done only by those who are the owners of such stock or their designated agents. Shareholder voting directs and controls basic corporate policy. The vote determines who will have the responsibility of conducting the business affairs of the corporate entity. Consequently, the identity of shareholders or their designated agents must

be ascertained at the time of, or prior to, shareholder discussions or voting. And so it is that, ordinarily, without presently demonstrable authority to act on behalf of one who holds stock, an alleged agent may not exercise any right, privilege, or power of a shareholder in such matters. Indeed, the agent's very admittance to shareholder meetings may be conditioned upon presentation of proof of such authority, which safeguards against outside interference into corporate matters.

A demand for fair cash value is, however, quite distinct from voting the shares, both as to the legal consequences of the act itself as well as to the pronounced lack of circumstances surrounding the act which might give rise to a necessary advance proof of written authority to act. The demand for fair cash value is not the exercise of a voting right. In fact, under R.C. 1701.85(A), the vote for merger must already have occurred before the right to make demand for appraisal arises. The legal effect of such demand is that the shareholder may no longer have any voice in the corporation's policy determinations. R.C. 1701.85(E) provides that from the time of demand notice, all of the shareholders' rights to vote the shares (supposing that the class of stock enjoys voting rights), rights to dividends, as well as all other rights arising from stock ownership "are suspended." Also, upon request of the corporation, such shares must be physically surrendered upon demand in order that the corporation may "endorse on them a legend to the effect that demand for fair cash value of such shares has been made." R.C. 1701.85(A)(5). This may be required because "after the demand, they are not 'good delivery' as shares, since they then represent merely an unliquidated monetary claim against the corporation." Committee Comment to R.C. 1701.85. Thus, rather than being the exercise of shareholder power, such demand instead functions as an abdication of rights and interests in the corporation. As a practical matter, the demand serves only a notice purpose that the shareholder prefers to sever his connection with the corporation. As previously mentioned, the dissenting shareholder who makes a demand for fair cash value will in all probability have already unsuccessfully voted against a merger. See R.C. 1701.85(A). Such dissent, and probability of demand for fair cash value, are therefore already manifested by the dissenting vote. Also the demand is a further expression of dissatisfaction and seeks compensation for the dissenting shareholder. Accordingly, there is no

then-present urgency to ensure, with absolute accuracy, that only those qualified to make demand are, in fact, doing so.[20]

Despite the inapplicability of portions of the Klein case to the one before us, we nevertheless continue to adhere to our view that a stranger to the corporation must provide proof of his authority to act prior to any exercise thereof. There is present both urgency as well as concerns of vital importance when, as correctly determined in Klein, the one claiming power to act as agent is a stranger to the corporation. Klein, supra, at 322, 35 O.O. at 304, 74 N.E.2d at 326. Such persons are third parties to the relationship between corporation and shareholder. The corporation has no obligation to, or authoirty over, one in such position, absent proof of authority to act. His announcement of demand for fair cash value is attended with the taint of suspicion that he acts on his own. It is, therefore, only reasonable that the corporation not be required to presume his authority upon his mere announcement of it. However, the shareholder who acts for other shareholders should not be held to such a standard. He is a fully interested party to the proceedings and is himself usually in harmony with those shareholders whom he represents. Moreover, his rights in making his own demand flow from his personal ownership of stock. The nature of his position, we feel, is of sufficient proximity to entitle him to a reasonable presumption that he possesses the claimed written authority. The corporation may, of course, insist upon viewing evidence of such written authority. However, prior to such demand, there is no requirement that a shareholder who makes demand for fair cash value for himself and other shareholders be required to provide evidence of his authority within the time limits imposed by R.C. 1701.85(A), so long as

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20. Klein, supra, made considerable reliance upon the rationales underlying the Delaware cases, In re Universal Pictures Co. (1944), 28 Del.Ch. 72, 37 A.2d 615, and Friedman v. Booth Fisheries Corp. (1944), 28 Del.Ch. 211, 39 A.2d 761. Their persuasiveness and applicability to the Ohio statute generally, and the case sub judice in particular, are greatly undercut by the fact that the Delaware corporate law upon which these cases were decided required a dissenting shareholder to inform the corporation prior to the merger vote of his intent to dissent, and demand an appraisal. It was this demand notice to which their rationales were applicable. See, e.g., Zeeb v. Atlas Powder Co. (1952), 32 Del.Ch. 486, 492, 87 A.2d 123, 125-126. Consequently, it would be of vital importance to ensure that the dissenter's agent is bona fide prior to his exercise of delegated rights. The requirement of prior proof of authority flowed from obvious concerns of fraudulent attempts to influence the merger vote to follow and, as such, was not unlike any other use of a proxy to vote shares. See, e.g., Zeeb, supra, at 492, 87 A.2d at 126; accord Raab v. Villager Industries, Inc. (Del.1976), 355 A.2d 888.

such authority in fact exists in writing at the time, and is later submitted to the corporation within a reasonable time.

In conclusion upon this issue, it is quite apparent that Klein is distinguishable from the present case. Not only was the agent in Klein a stranger to the corporation, but he possessed no written authority to act at the time he did so. In the case here, Armstrong was herself a shareholder, and no stranger to the corporation. Not only did the required written authority exist prior to her exercise thereof, but she also possessed such authority. Moreover, she delivered proof of her authority within a reasonable time following the filing of demand, and did not, as in Klein, merely execute powers of attorney on the eve of litigation. We therefore affirm the decision of the court of appeals as to this issue.

III.

Lillian Werk Price, Trustee (hereinafter "Price Trust") sought a determination as to fair cash value of those shares held in trust. During the initial stage of the proceedings, which was specifically devoted to a determination of which shareholders would be eligible to participate in the later determination of fair cash value, the trial court sustained a motion for summary judgment by Marathon Oil against Price Trust. By its entry of final judgment of February 8, 1983, the trial court ordered Price Trust dismissed from the case with prejudice, which order was timely appealed to the Court of Appeals for Hancock County.

Thereafter, the remaining parties to the statutory proceeding entered into the trial preparation stage. This involved extensive discovery among the remaining parties, including interrogatories and depositions. The discovery ultimately resulted in an exchange of fifteen to twenty thousand documents. The final pretrial conference was scheduled for September 14, 1983 with trial to begin on October 3, 1983.

On September 6, 1983, the court of appeals reversed the decision of the trial court and remanded the Price Trust claim for determination of the fair cash value of Price Trust's shares. On September 8, 1983, Price Trust moved for a continuance of thirty days as to both the pretrial conference and the trial date. The trial court denied the motion on the very day it was made, as it also did for the September 14, 1983 motion for reconsideration. On September 15, 1983, Price Trust requested a continuance of six months which was again denied on that same day. Price Trust ultimately appealed this issue, following trial, to the court of appeals which held that the trial court abused its discretion by denying a continuance. Marathon has appealed such decision to this court, arguing

that the trial court's decision was within its sound discretion. We now affirm the determination of the court of appeals in part and modify in part.

It is uncontested that Price Trust did not participate in any discovery from the time of dismissal until such error was corrected by the court of appeals. This was, of course, the major reason that a continuance was sought. It is also undisputed that Marathon's right to appeal the decision of the court of appeals to the Ohio Supreme Court had not lapsed. Further, the chief counsel for Price Trust was out of town, due to a family death, from September 6, 1983, which was the day the decision of the court of appeals was released, until approximately September 12, 1983.

Against the above excellent grounds for granting a continuance, none of which were contrived, dilatory, or resulted from any act of Price Trust, Marathon asserts that the trial court had extended to Price Trust's counsel an invitation to continue discovery pending appeal. Such claim is based upon correspondence from Judge Walker to Price Trust's counsel which stated: "I am enclosing herewith a copy of the entry setting up the pretrial conference in the Marathon cases for February 22, 1983.

"I understand that each of you (is) appealing certain rulings of the Court and that the Court of Appeals has not ruled in any of these cases but you are each welcome to attend. Your participation will be governed by the Court, however, you have every right to confer with all other counsel." (Emphasis added.)

It is Marathon's contention that Price Trust made "a conscious tactical decision, in the face of an approaching trial date, not to participate in the discovery proceedings." This, it is asserted, was part of a deliberate risk which Price Trust took "that if the appeal were successful, Price would be facing a trial date in October of 1983. * * * "

It appears that both Marathon and the trial court have overbroadened the scope and degree of power available to trial courts in circumstances such as those before us. One who, as Price Trust, is dismissed with prejudice from a consolidated action before the trial court no longer has any standing to pursue discovery. Also, it is a contradiction to dismiss a party's claims on its merits, and yet attempt to provide continued "participation" during the pendency of the appeal. Moreover, a trial court may not order any remaining parties, such as Marathon, to comply with discovery requests presented by one who is no longer a party to the action. Final judgment by the trial court brings to an end its jurisdiction over the party whose claim is so adjudicated. (11)(12)

Upon remand from the court of appeals, Price Trust was entitled to a reasonable discovery period prior to trial. It is basic law that an "action of the Court of Appeals in reversing the cause and remanding the case to the Court of Common Pleas for further proceedings has the effect of reinstating the cause to the Court of Common Pleas in statu quo ante. The cause is reinstated on the docket of the court below in precisely the same condition that obtained before the action that resulted in the appeal and reversal." 5 Ohio Jurisprudence 3d (1978) 426, Appellate Review, Section 717. (Emphasis added.) Furthermore, this court has specifically held that upon remand from an appellate court the lower court is required to proceed from the point at which the error occurred. State ex rel. Stevenson v. Murray (1982), 69 Ohio St.2d 112, 113, 23 O.O.3d 160, 431 N.E.2d 324, 325. In the case sub judice, Price Trust was ruled ineligible to proceed at what was a preliminary stage in the proceedings. Upon remand, it therefore should have been permitted to continue the presentation of its case from its last procedural position prior to dismissal. This would have entitled Price Trust to a reasonable discovery period to prepare its case. Specifically, the correct procedure here would have been to continue all of the cases for a reasonable period of time.

Price Trust's claim had been consolidated with the claims of the other dissenting shareholders into a single action for fair cash value of their shares. Based upon the statutory command to determine "the fair cash value of a share " (emphasis added), it may be concluded that the intent of the General Assembly was that a single determination under R.C. 1701.85 be conducted and not multiple proceedings upon the same issue, with various potential outcomes. Had Price Trust sought a continuance for itself alone, or, had the trial court ordered such, neither of which occurred in the case here, then Price Trust would have had to overcome both collateral estoppel and statutory barriers to a later proceeding.

We therefore affirm the determination of the court of appeals that the trial court erred in this regard. However, from the time of the denial of the motions for continuance Price Trust has received considerable documentation, including fifteen to twenty thousand documents six days before trial. It has since had considerable time in which to make its evaluation of such material as well as the testimony of the expert witnesses. Also, the issues, pursuant to our determination of the first (valuation) issue above, have been considerably narrowed, and are resolvable without recourse to a further evidentiary hearing. Nevertheless, Price Trust may, if it so chooses, engage in a limited discovery upon those

case. However, this is not to say that causes of action which seek compensation other than the value of a dissenter's shares of stock are not maintainable. Provable injury under whatever theory utilized is compensable so long as it does not seek to overturn or modify the fair cash value determined. Such theory may not, however, be joined to the R.C. 1701.85 proceeding, but is a separate cause of action subject to the applicable statute of limitations and res judicata. See Radol v. Thomas (C.A. 6, 1985), 772 F.2d 244, certiorari denied (1986), 477 U.S. ——, 106 S.Ct. 3272, 91 L.Ed.2d 562, wherein a considerable number of Harrell's claims were considered and rejected.

The cause is accordingly remanded to the trial court for proceedings not inconsistent with this opinion.

Judgment affirmed in part, reversed in part and cause remanded.

MOYER, C.J., and PATTON, LOCHER and WRIGHT, JJ., concur.

DOUGLAS and HERBERT R. BROWN, JJ., separately concur in part and dissent in part.

PATTON, J., of the Eighth Appellate District, sitting for SWEENEY, J.

DOUGLAS, Justice, concurring in part and dissenting in part. I concur in the judgment of the majority as to the determination of fair cash value. I only write separately to indicate my disagreement with the analysis of the majority on some of the issues such as the questions involving the Price Trust and the Armstrong authority. It is my judgment that the trial court did a remarkable job under difficult circumstances. Judge Walker's disposition of the case should be reinstated in its entirety except for the determination of the fair cash value. It is understandable why Judge Walker would use the method he used to determine fair cash value rather than following the strict dictates of R.C. 1701.85(C). However, I read R.C. 1701.85(C) to be mandatory and therein lies my only disagreement with the trial court's judgment. Whichever method is used, that adopted by the trial judge or the procedure outlined in R.C. 1701.85(C), will make very little difference in the ultimate fair cash value determination.

Accordingly, I would reverse the court of appeals and remand the cause to the trial court for the sole determination of fair cash value using the formula set out in R.C. 1701.85(C). I would reinstate the remainder of the judgment of the trial court in all respects.

HERBERT R. BROWN, J., concurring in part and dissenting in part. I agree with the well-reasoned opinion authored by Justice Holmes, except in one respect.

I cannot agree that the trial judge abused his discretion in not granting a continuance of the trial date, as requested by the Price Trust. In complex, multi-party litigation such as the case sub judice, deference must be given to the problems a trial judge faces in bringing the issues to trial.

Here, there are three reasons to uphold the trial judge's ruling denying the continuance: First, Price Trust has raised no substantive issue that was not presented by the other dissenting shareholders. Second, Price Trust had available to it the voluminous discovery conducted by the other dissenting shareholders. Finally, given the disposition which we make on the valuation issues, it is difficult to see what remains to be discovered. The majority opinion states: "(T)he issues, pursuant to our determination of the first (valuation) issue above, have been considerably narrowed, and are resolvable without recourse to a further evidentiary hearing." (Emphasis added.) Having found that there is no need for an evidentiary hearing, the majority opinion, in the next sentence, makes the astonishing pronouncement: "Nevertheless, Price Trust may, if it so chooses, engage in a limited discovery upon those issues yet to be determined and may present any new evidence upon such issues as has not already been placed within the record." (Emphasis added.)

I think, in charging the trial judge with abuse of discretion, we demonstrate a lack of sensitivity to the realities of this case.

al., do contend that net asset value of the stock should be taken into consideration and indicate that they would like the stock to be valued upon the basis of net asset value, the fact that they might urge net asset value as being most indicative of fair cash value does not justify disregard of all of the evidence adduced by Armstrong, et al. Net asset value was admissible evidence bearing upon the price that a willing buyer would pay and a willing seller would accept for substantially all of the shares of Marathon on the day before the merger vote, as is the evidence of the tender offer of U.S. Steel and the acceptance thereof by the holders of more than ninety percent of the shares of Marathon stock.

On the other hand, Marathon's evidence of a value of less than $50 per share was predicated upon an estimated value of the price for which the remaining forty-nine percent of Marathon sales would sell in isolated sales on the New York Stock Exchange, had there been no merger, ignoring the value of the fifty-one percent of outstanding shares acquired by U.S. Steel. However, the value per share must take into account all the shares of Marathon stock, including those acquired by U.S. Steel through its tender offer. Although Marathon did present testimony of an expert opinion as to what would have been the stock market price of Marathon stock on March 10, 1982, had there been no tender offer by anyone, or if there had been an unsuccessful tender offer, such evidence was little more than conjecture and, in any event, did not purport to constitute an opinion as to the per-share value of Marathon stock in a sale involving all, or substantially all, of the shares of Marathon stock.

Although stock market value may be controlling evidence of the market value of stock for other purposes, such as estate valuation, R.C. 1701.85 specifically contemplates that a dissenting shareholder will be paid fair cash value for his stock. Because of the very nature of the statutory transactions covered by R.C. 1701.85, the result is transfer of the ownership of the corporation, rather than the isolated sale of a small fractional portion of the outstanding shares of the corporation. Fair cash value within the purview of R.C. 1701.85 necessarily, therefore, must contemplate the per-share value of the corporation stock in a transaction involving sale of all, or substantially all, of the outstanding shares of the corporation. For that purpose, the willing buyer/willing seller definition applies, not with respect to the sale of a single share or small number of shares of the corporation but with respect to the sale of all, or substantially all, of the shares of the corporation. Necessarily, this must be a hypothetical market as indicated in Vought since, ordinarily, there is no actual market for the sale of all the outstanding shares of stock of a corporation, although in this case there is evidence both of unsuccessful

and successful tender offers for a substantial portion of the outstanding shares of Marathon.

The hypothetical market value approach to determination of fair cash value, which we have outlined herein, is not only consistent with present R.C. 1701.85, but also is consistent with the instruction found to be erroneous by the second paragraph of the syllabus of Roessler. Also, the hypothetical market approach with respect to all, or substantially all, the shares of the corporation necessarily precludes fair cash value, being determined upon the basis of the intrinsic value of the shares. Thus, paraphrasing the instruction rejected by the second paragraph of the syllabus of Roessler, the term "fair cash value" means a sum equal to the price per share, which it is reasonably probable would have resulted from a sale of all, or substantially all, the shares of the corporation for cash, after fair negotiation between a bona fide purchaser, able and willing to buy for cash, but under no compulsion to buy, and an owner willing to sell but under no compulsion to sell, after fair and reasonable efforts to obtain the purchaser who would pay the highest price.

Although we agree with Marathon that, under present R.C. 1701.85, fair cash value does not mean intrinsic value, we disagree with Marathon's hypothesis that, under present R.C. 1701.85, fair cash value is equal to the market price for which a single share of stock would sell on the market if offered for sale. R.C. 1701.85(C) does define fair cash value of a share terms of market value as being the amount "which a willing seller, under no compulsion to sell would be willing to accept, and which a willing buyer, under no compulsion to purchase, would be willing to pay." However, R.C. 1701.85(C) does not dispense with the underlying meaning of fair cash value, and the market must be one upon which all, or substantially all, of the shares are offered for sale in a single transaction, the underlying meaning of fair cash value considered by the Supreme Court in Roessler in adopting the intrinsic value approach to fair cash value.

The legislature, however, recognized that a willing buyer of all, or substantially all, the shares of a corporation might not be willing to pay the per-share intrinsic value for each share of stock because of other circumstances. Thus, the legislative defined fair cash value in terms of the price that a willing buyer would be willing to pay and a willing seller would be willing to accept, but did not preclude consideration of the per-share value of all the shares of the corporation sold in a single transaction because this is essentially the circumstance involved, since in case of a merger, all of the shares of the corporation are sold or exchanged, and an

court asserted, was "(t)he maximum rate of interest in Ohio." Despite the fact that such evidence was so offered, it was that court's view that it need not consider evidence of other possible rates of interest.

The court of appeals reversed the decision of the trial court. It held that the trial court "applied a statutory rate which is neither applicable nor controlling." Insofar as R.C. 1701.85 sets forth a "special proceeding" within the meaning of R.C. 2505.02, and one which provides for an interest rate based upon all equitable considerations, we are constrained to agree with the court of appeals that the statutory rate was not controlling. The trial court therefore should have considered other evidence as presented by the parties, including, but not limited to, the prevailing rate of interest for various kinds of loans, the average prime rate over that period of time and any other such evidence. The sole statutory constraint is found in R.C. 1343.01 et seq. which prohibits a usurious rate of interest.

We do not, however, consider the statutory allowance of interest, upon whatever fair cash value is determined, to provide for an additional hearing. It is sufficient that the parties submit written briefs upon this issue and their evidence. Upon such basis, the trial court may, within its own discretion, determine an interest rate "which the court considers equitable." There is, of course, no question that such an award is interest upon the value of the shares and, despite tax considerations, not a damages award.

VI

Finally, Dorothy Harrell appeals the decision of the courts below which refused to allow her to join numerous other causes of action into the R.C. 1701.85 proceeding. Supporting her on this issue are amici curiae, Charles Nickels et al.

These causes of action arise out of the actions of the Marathon board of directors in structuring and consummating the tender offer-merger transaction before us. The essence of these claims, primarily equitable in nature, is that the board of directors and controlling shareholders of their company breached their fiduciary duties in connection with the initiation, timing, negotiation, structure, approval, etc., of that merger. Consequently, plaintiffs and amici would require an inquiry into the entire fairness of the transaction and, presumably, allow whatever inquiry is necessary on the issue of the value of the corporation in light of the price offered to the dissenting shareholders for their stock, citing Weinberger v. UOP, Inc. (Del.1983), 457 A.2d 701, and Rabkin v. Philip A. Hunt Chemical Corp. (Del.1985), 498 A.2d 1099. See, also, Singer v.

Magnavox Co. (Del.1977), 380 A.2d 969; Tanzer v. International General Industries, Inc. (Del.1977), 379 A.2d 1121.

Although not dwelt upon in the briefs, Rabkin, supra, and Singer supra, allow the maintenance of an alternative cause of action in addition to the Delaware statutory proceeding for the appraisal of dissenting shareholders' stock. Del.Code Ann. Title 8, Section 262 (1975). The Delaware statute, of course, relied specifically upon the stock market price as representing the value of the stock. Id. at Section 262(k), deleted by amendment (1983). By allowing the additional cause of action outside the statutory guidelines, the courts of Delaware permitted analysis of the amount offered to minority shareholders under theories of breach of fiduciary duties, lack of proper business purpose in cashing out the minority shareholders, gross inadequacy of price, misrepresentations in the proxy statement, failure to consider the "full value" of the shares, and that by breach of these fiduciary duties, the corporation failed to pay the full, fair value of the shares held. Obviously, such causes of action, centering as they do around the issue of whether the transactions provided "entire fairness" to the dissenters, permit a full inquiry into the intrinsic value of the dissenters' stock utilizing "any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court." (Emphasis added.) Weinberger, supra, at 713. [21]

The issue accordingly narrows to whether the statutory proceeding under R.C. 1701.85 is the exclusive means for the determination of the price that shall be paid for those shares held by the dissenting shareholders. For those reasons which follow, we must hold that the statutory proceeding alone should be used to determine such value.

As demonstrated in Part I, supra, the legislature has evidenced a specific intent to narrow price considerations to those pertinent to the willing buyer- willing seller standard. R.C. 1701.85(C). This invariably refers to the market price of the stock and, where sufficiently traded, the stock market price. Moreover, we have indicated the preferability of the stock market price as representative of the value of the dissenters' shares. The causes of action contended for go well beyond the stock market standard.

Therefore, the statutory proceeding under R.C. 1701.85 is the sole means for determining the value of a dissenter's shares in the present

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[21]. See fns. 5-10, supra, and accompanying text.

LILLIAN WERK PRICE, TRUSTEE, ET AL., PLAINTIFFS-APPELLANTS
CROSS-APPELLEES, v. MARATHON OIL COMPANY (NOW MARATHON
PETROLEUM (COMPANY), DEFENDANT-APPELLEE CROSS-APPELLANT
GORDON T. HODDINOTT, PLAINTIFF-APPELLANT CROSS-APPELLEE, v.
MARATHON OIL COMPANY, DEFENDANT-APPELLEE CROSS-APPELLANT
DONALD M. WHITE, PLAINTIFF-APPELLANT CROSS-APPELLEE v.
MARATHON OIL COMPANY, DEFENDANT-APPELLEE CROSS-APPELLANT
CEDE & CO., ET AL., PLAINTIFFS-APPELLANTS CROSS-APPELLEES,
v. MARATHON OIL COMPANY, DEFENDANT-APPELLEE CROSS-APPELLANT
DOUGLAS B. LITTLEWOOD, PLAINTIFF-APPELLANT CROSS-APPELLEE,
v. MARATHON OIL COMPANY, DEFENDANT-APPELLEE CROSS-APPELLANT
FRANCIS A. ARMSTRONG, ET AL, PLAINTIFFS-APPELLANTS CROSS-APPELLEES, v. MARATHON OIL COMPANY, DEFENDANT-APPELLEE CROSS-APPELLANT

Price, Hoddinott, White, Cede & Co., Littlewood, Armstrong v. Marathon Oil Co.

Nos. 5-84-4; 5-84-5; 5-84-6; 5-84-7; 5-84-8; 5-84-9

Court of Appeals, Third Appellate District of Ohio, Hancock County, Ohio

January 14, 1986;

DISPOSITION: Judgment reversed and cause remanded. JUDGES: WHITESIDE, J., of the Tenth Appellate District, sitting by assignment in the Third Appellate District. GUERNSEY, P.J., and MILLER, J., concur.
OPINION: WHITESIDE, J.

This is an appeal from a judgment of the Hancock County Court of Common Pleas with respect to valuing the shares of Marathon Oil Company (hereinafter Marathon) the day before its merger with a subsidiary of the United States Steel Corporation, the subsidiary being named Marathon Petroleum Company. n1 The appellants, Frances A. Armstrong, et al., are dissenting shareholders (hereinafter Armstrong, et

al.), who objected to the merger and brought this action pursuant to R.C. 1701.85.

Early in 1981, the management of Marathon recognized that Marathon might be a "takeover" target because Marathon stock was selling on the New York Stock Exchange at a price significantly lower than the market value of the company's assets. Accordingly, Marathon had two market evaluations made, one externally by First Boston Corporation, a New York investment banking firm, and the other internally by John F. Strong, the assistant to the president of Marathon. The First Boston report indicated a per-share value of Marathon stock of between $188 and $225; whereas, the Strong report indicated a per-share value of Marathon stock of between $276 and $323. Both of these reports were predicated upon the net equity value of Marathon, that is, the value of Marathon assets less liabilities.

On October 30, 1981, Mobil Corporation announced a tender offer to purchase up to forty million shares (approximately sixty-seven percent) of Marathon stock at $85 per share and indicated that, if successful in acquiring at least thirty million shares (approximately fifty-one percent of outstanding stock), Mobil would seek to acquire the remaining shares through an exchange or merger offer, by which shareholders would receive securities valued by Mobile at $85 per share. The next day, the Board of Directors of Marathon, called into emergency session, determined the Mobil offer to be grossly inadequate and not in the best interest of Marathon or its shareholders and authorized Marathon officers to take steps necessary to block Mobil's takeover attempt, including: (1) the sending of letters to Marathon shareholders urging them not to tender their shares to Mobil; (2) filing an action seeking to enjoin the Mobil takeover; (3) the undertaking of efforts to secure a "white knight" to extend a friendly takeover tender; and (4) consideration of a complete or partial liquidation of Marathon.

On November 1, 1981, Marathon filed an action in the United States District Court seeking to enjoin the planned takeover by Mobil, which action was eventually successful. The aid of First Boston was enlisted to search for other companies which might be interested in acquiring Marathon at a price substantially higher than the Mobil offer. Such search for a "white knight" was successful culminating in the announcement on November 19, 1981, that Marathon and U.S. Steel had entered into a merger agreement. Under the U.S. Steel proposal, U.S. Steel would extend a tender offer for fifty-one percent of the outstanding stock of Marathon at a price of $125 per share, to be followed by a merger proposal in which each remaining Marathon shareholder would

receive a $100 face value twelve-year bond, paying a guaranteed twelve and one-half percent interest, for each remaining share of Marathon stock.

Although approximately forty-seven percent of Marathon shares were tendered to Mobil in response to its tender offer $85 per share, by December 4, 1981, approximately 91.4 percent of Marathon shares had been tendered to U.S. Steel.

As part of the U.S. Steel offer, it received an option to purchase ten million authorized, but unissued, shares of Marathon for $90 per share, as well as an option to purchase one of Marathon's largest assets, a forty-eight percent interest in the Yates field for 2.8 billion dollars. Not only was there litigation in the federal court with respect to Mobil's tender offer, but also an action was commenced in federal court with respect to the U.S. steel tender offer.

On December 23, 1981, the United States Court of Appeals for the Sixth Circuit affirmed a district court ruling that the two options granted U.S. Steel were illegal and manipulative and ordering U.S. Steel to relinquish them. On the next day, upon remand, the district court extended to January 6, 1982, the withdrawal date, by which shareholders could withdraw their acceptance of the U.S. Steel offer but made no change of the December 4, 1981 proration date, that is the date by which Marathon shareholders had to tender their shares to U.S. Steel. Accordingly, on January 7, 1981, U.S. Steel purchased approximately fifty-one percent of Marathon stock, consisting of approximately 30 million of Marathon's outstanding shares, by accepting the tenders of more than ninety percent of the Marathon stock on a proration basis.

In the interim, Mobil announced that, if the U.S. Steel offer including the options were ruled illegal, it, Mobil, would increase its tender offer to $126 per share. Additionally, Gulf Oil Company proposed to discuss a merger with Marathon at a price of approximately $120 per share, but no meaningful negotiations took place.

Subsequently, on March 11, 1982, the second step of the acquisition of Marathon by U.S. Steel was completed by approval of the merger by shareholders owning more than two-thirds of all Marathon shares, including the fifty-one percent now owned by U.S. Steel. Thereafter, dissenting shareholders, following the procedures of R.C. 1701.85, commenced this action to have the value of their shares determined and paid for by Marathon. At the ensuing trial, the dissenting shareholders, Armstrong, et al., presented evidence, including expert testimony that the value of Marathon stock on March 10, 1982, was between $163 and $235, one expert testifying the value to be 4200, plus or minus fifteen percent (Tr. 1026-1027), and another testifying that the value

was approximately $197 per share (Tr. 1865-1881). Marathon introduced expert evidence that the per-share value of Marathon stock on March 10, 1982, would be as low as $47.43. (Tr. 2564.) On March 10, 1982, the day before the approval of the merger, Marathon stock sold on the New York Exchange for $75.75. The trial court rendered a sixty-five page decision, finding the per-share value of Marathon stock on March 10, 1982, to be $78 per share. It is from the ensuing judgment that the dissenting shareholders, Armstrong, et al., have appealed, raising eight assignments of error as follows: "I. The Common Pleas Court erred in its determination of 'Fair Cash Value.' "II. The Common Pleas Court erred in awarding interest at the rate of only eight percent per annum. "III. The Common Pleas Court erred in ruling the demands for fair cash value made pursuant to valid powers of attorney were ineffective. "IV. The Common Pleas Court erred in ruling the powers of attorney signed by plaintiffs Auer, Hutchins and Lott to be ineffective. "V. The Common Pleas Court erred in ruling the demand of plaintiffs Kitzler to be ineffective. "VI. The Common Pleas Court erred in ruling that the term 'deliver' as used in R.C. @ 1701.85 means 'physical receipt' by Marathon.

"VII. The Common Pleas Court erred in failing to find that plaintiffs Moore, Turkin and Flowers demonstrated 'good cause' for their failure to deliver their share certificates to Marathon for legending. "VIII. The Common Pleas Court erred in failing to award all plaintiffs semi-annual payments of interest."

Additionally, Marathon filed a cross-appeal and a cross-assignment of error as follows: "In determining the fair cash value of a share of Marathon stock on March 10, 1982, the Court of Common Pleas erred in using the market value of Marathon stock as of January 6, 1982, since that value overstated fair cash value and did not, in accordance with O.R.C. @ 1701.85, calculated fair cash value as (i) the market price at which a willing buyer and a willing seller would and did transfer a share of Marathon stock on March 10, 1982, the day prior to the shareholder vote on the merger in question, (ii) with such market price adjusted to exclude appreciation due to the pending merger."

The threshold issue, and that raised by Armstrong's first assignment of error, and by Marathon's cross-assignment of error, is whether the trial court erred in its determination of fair cash value of Marathon shares both from a factual and legal standpoint; that is, whether the trial court correctly applied R.C. 1701.85.

In Roessler v. Security Savings & Loan Co. (1947), 147 Ohio St. 480, the Supreme Court held in the first paragraph of the syllabus: "The 'fair cash value' which a dissenting shareholder in a corporation is entitled

to receive for his shares in a proceeding brought pursuant to Section 8623-72, General Code, is the intrinsic value of the shares determined from the assets and liabilities of such corporations, upon consideration of every factor bearing on value."

At that time, former G.C. 8623-72 contained no definition of fair cash value but provided that a dissenting shareholder "shall be paid the fair cash value of his shares as of the day before the vote was taken authorizing any such action, excluding from such fair cash value any appreciation or depreciation and consequence of the consolidation or other matter which entitled him to such relief * * *." Former G.C. 8623-72 also provided that appraisers should be appointed to determine this fair cash value upon instructions from the court as to their duties, and that the court "on such evidence as the court may consider relevant," should confirm the award of the appraisers if it be found to be reasonable. In 1955, former G.C. 8623-72, then recodified as R.C. 1701.80, was amended and renumbered R.C. 1701.85, to include a definition of fair cash value, which definition remains in effect in present R.C. 1701.85(C), which provides in pertinent part: "In the case where the proposal was required to be submitted to the shareholders of the corporation, fair cash value shall be determined as of the day prior to that on which the vote by the shareholders was taken. * * * The fair cash value of a share for the purposes of this section, is the amount which a willing seller, under no compulsion to sell, would be willing to accept, and which a willing buyer, under no compulsion to purchase, would be willing to pay, but in no event shall the amount thereof exceed the amount specified in the demand of the particular shareholder. In computing such fair cash value, any appreciation or depreciation in market value resulting from the proposal submitted to the directors or to the shareholders shall be excluded."

It is apparent that the legislature rejected the intrinsic value definition of fair cash value adopted by the first paragraph of the syllabus of Roessler and, instead, adopted the equivalent of the trial court instruction rejected by the second paragraph of the syllabus of Roessler that:'[T]he term "fair cash value" means a sum equal to the price which it is reasonably probable would have resulted from a sale of said shares for cash, after fair negotiation between a bona fide purchaser, able and willing to buy for cash, but under no compulsion to buy, and an owner willing to sell, but under no compulsion to sell, after fair and reasonable efforts to obtain the purchaser who would pay the highest price.'"

The simplistic approach to determination of fair cash value of stock traded on the New York Stock Exchange, or other equivalent exchange, would be to obtain the New York Stock quotation for the day

before the stockholder vote resulting in the merger. However, necessarily, such a stock market price will be influenced by the merger proposal and must be adjusted for appreciation or depreciation in price as a result of such proposal. However, such simplistic approach, as is demonstrated by the evidence in this case, is not necessarily indicative of fair cash value. While stock may be traded on a stock exchange, it also may be sold privately and may be sold in large groups between individuals, including a transaction such as took place in this case by the U.S. Steel acquisition of fifty-one percent of the shares of Marathon through a tender office.

Significantly, the legislature elected no to change the determination from fair cash value to fair market value but, instead, defined fair cash value in terms of willing buyer and willing seller after adjustment for appreication or depreciation resulting from the action from which the shareholder dissents.

In Vought v. Republic-Franklin Ins. Co. (1962), 117 Ohio App. 389, a hypothetical market value standard was adopted as being that contemplated by R.C. 1701.85(C), stating in part at 390-91:

> "* * * The objective in adopting the standard is not to measure value by an actual market but rather by a hypothetical one. Such a standard generally will permit evidence to be introduced as to any factor which a reasonable man would take into consideration in determining value. Actual market conditions are, therefore, open to proper interpretative evidence."

However, the Vought court suggested that, in case of stock trading on the New York Stock Exchange, evidence of the stock market price might be controlling. Thus, the same court in Parten v. Pure Oil Co. (July 1, 1969), No. 9023, unreported, Court of Appeals of Franklin County (1969 Opinions 789), held with respect to stock widely trading on the New York Stock Exchange, in the absence of other proper evidence of fair cash value, that the price upon which the stock was selling on the New York Stock Exchange should be the starting point for determination of fair cash value, but that such price must necessarily be ajusted for appreciation or depreciation as a result of the proposal acted upon by the shareholders. However, Parten was determined upon the evidence presented in that case, with the court finding that there was no other significant or meaningful evidence of fair cash value as of the day before the stockholder vote.

If we were to utilize the Parten approach, the stock market price on March 10, 1982, was $75.75, only $2.25 less than the value found by the trial court. In light of all of the evidence, not only was the price

affected by the proposed merger, but the surrounding circumstances clearly indicated, despite the contention of Marathon to the contrary, that the value of Marathon stock was severely depreciated by the proposed action, at least to an extent of more than $2.25 per share. Moreover, as the trial court noted:

> "From January 7, 1982, until March 11, 1982, the transfers were in effect transactions that involved the possibility of acquiring a bond backed by U.S. Steel, not a stock transfer even though there was a great deal of transactions involving Marathon stock on the big board."

On March 10, 1982, it appears that the selling price of each $100 bond would be only $76. Nevertheless, the stock market selling price on March 10, 1982, of $75.75 per share was evidence to be considered by the trial court, together with all the other evidence of fair cash value. As in Parten, it would not necessarily be inappropriate for the trial court to start with that stock market selling price and then make adjustments predicated upon the evidence.

However, fair cash value as contemplated by R.C. 1701.85 is not the price of isolated or casual sales of stock in the open market, even upon an exchange such as the New York Stock Exchange. In other words, although the price at which stock is selling on the New York Stock Exchange is evidence of fair cash value, it is not controlling evidence in any case of fair cash value, as the court in Parten pointed out. In the absence of other significant or meaningful evidence, the price at which stock is selling on the New York Stock Exchange may well be an appropriate starting point for determining fair cash value. Here, however, there is other significant meaningful evidence.

In determining fair cash value pursuant to R.C. 1701.85, isolated or casual sales of stock upon the open market even upon an exchange such as the New York Stock Exchange is evidence but is not the determination that is involved. Rather, as noted in Vought, we are dealing with a hypothetical market for all the outstanding shares of the stock of the corporation. In other words, what is to be valued is not the value of a single share if it were to be sold in an isolated sale, but, instead, the value per share of all the shares of the corporation, which can be determined only upon the basis of a hypothetical market or sale of all of the shares of the corporation.

In this case, there is evidence of an actual sale of fifty-one percent of the stock of Marathon at a tender price of $125, with more than ninety percent of the shares being tendered at that price. Additionally,

there was evidence of a tender offer of $85 per share, which was accepted by forty-seven percent of the outstanding shares. There is also evidence of a greatly fluctuating New York Stock Exchange price from the time of the Mobil tender offer in October to the time of the merger slightly over four months later. On the day of the Mobil tender offer, the New York Stock Exchange price was $67.50 and rose to a high of more than $108 after announcement of the U.S. Steel tender offer. As the evidence indicates, the blended offer of U.S. Steel was $106 per share. Such offer, accepted by a vast majority of th shareholders of Marathon, constitutes evidence of the price a willing buyer would pay and a willing seller would accept for substantially all of the share of Marathon stock, even though the offer may have been influenced by other factors. However, control of Marathon was not the only objective of U.S. Steel but, instead, the real objective was the purchase of all the outstanding shares of Marathon as an investment.

What is contemplated by R.C. 1701.85 and is expressed in the hypothetical market value standard of Vought is a transaction involving the sale of all, or substantially all, of the shares of the corporation, not a transaction involving the casual sale of a small number of the shares of the corporation, such as each transaction on the New York Stock Exchange may involve. Thus, the appropriate determination is the fair cash value per share of the corporation in a transaction involving the sale of all, or substantially all, of the shares of the corporation. Not only is this what is involved in a merger, but R.C. 1701.85 applies not only to mergers, but also to sales of all, or substantially all, the assets, which may include the good will of a corporation pursuant to R.C. 1701.76, from while some shareholders may dissent and, pursuant to R.C. 1701.76(C), be entitled to relief under R.C. 1701.85.

The trial court erred in determining the per-share value solely upon the isolated sales of Marathon Stock on the New York Stock Exchange on a date some two months prior to the merger vote. Instead of determining the per-share value of Marathon stock in a transaction involving the sale of all, or substantially all, of the stock of Marathon, the trial court determined the per-share value upon the basis of isolated sales of small amounts of Marathon stock on the New York Stock Exchange, ignoring the other evidence of value.

Although Marathon and the trial court characterized the value sought by Armstrong, et al., as inappropriately being the intrinsic value of Marathon stock in accordance with the legislatively rejected intrinsic value standard of Roessler, the evidence indicates that the intrinsic value of Marathon stock would be at least $163 per share. While Armstrong, et

equivalent situation exists when substantially all the assets of a corporation are sold whether or not good will is included.

Both Armstrong, et al., by their first assignment of error, and Marathon by its cross-assignment of error, contend that the trial court erred in its methodology of determining fair cash value, in that the trial court used the stock market price of Marathon stock as of January 6, 1982, as the predicate for determination of fair cash value. The trial court chose the January 6, 1982 stock market price finding it to be "the last effective date of trading before the vote on the merger between Marathon and U.S. Steel Corp." R.C. 1701.85, however, requires that the stock be valued as of the day before the merger vote.

The statute does not contemplate choosing the stock market price as of a certain date as being the appropriate fair cash value. Rather, the statute specifically requires that any effect by the way of appreciation or depreciation in value resulting from the proposal itself be disregarded. Inasmuch as the merger proposal was adopted originally on November 18, 1981, and amended on January 26, 1982, the proposed merger commenced to affect value as of November 18, 1981, the date of the adoption of the proposal, at which time the stock market price was $77 per share, the Mobile tender offer was $85 per share, and the U.S. Steel blended offer was $106 per share. On the other hand, shortly over two weeks before on November 2, 1981, the stock market price was $90 per share, which price was obviously unaffected either by the proposed merger or the U.S. Steel tender offer, although it may have been affected by the Mobil tender offer of $85 per share.

The stock market price for Marathon stock reached a high of $108.125 on November 27, 1981. The stock market price for Marathon stock declined significantly after federal court decisions cleared the way for the consummation of the U.S. Steel tender offer and proposed merger.

If the stock market price were the sole and controlling measure of the fair cash value of Marathon stock as of March 10, 1982, the stock market price for that date should be the starting point for determination of fair cash value, with adjustments being made for appreciation or depreciation as a result of the proposed merger. Such effect cannot be determined solely by picking a specified date for valuation, namely, in this case, the day before the actual consummation of the U.S. Steel tender offer. Clearly, any stock market price after November 18, 1981, was affected by the proposal, although the degree and nature of the effect may not be entirely clear. Additionally, it is common knowledge that stock market prices fluctuate even during a given day, reaching both a low and a

high, and in most instances the closing price was the stock market price utilized in this case.

Accordingly, even if the stock market price of Marathon stock were the sole controlling factor in determining fair cash value, the trial court erred in selecting the stock market price on the day before consummation of U.S. Steel's tender offer as being the fair cash price. The only stock market price properly to be utilized is that on the day before the vote upon the proposed merger by the stockholders of Marathon, or March 10, 1985, which would then be adjusted for appreciation or depreciation created by the proposed merger. Clearly, when all the evidence is considered, the stock market price on March 10, 1982, did not represent the fair cash value of a share of Marathon stock, as all parties seem to agree, and the trial court to consider all of the evidence and determine the fair cash value of Marathon stock predicated upon the totality of the evidence, rather than to select the stock market price on a different date.

Accordingly, both Armstrong, et al.'s first assignment of error and Marathon's cross-assignment or error are well-taken to the extent that the trial court erred in using the stock market price of Marathon stock as of January 6, 1982, as being the fair cash value of the stock.

By their second assignment of error, Armstrong, et al., contend that the trial court erred in awarding interest at the rate of eight percent per annum. We agree.

R.C. 1701.85(B) specifically provides that: "The court shall thereupon make a finding as to the fair cash value of a share, and shall render judgment against the corporation for the payment of it, with interest at such rate and from such date as the court considers equitable." The trial court is not bound by any specific rate but, instead, must determine the interest rate that is equitable under all the attendant circumstances.

The trial court gave little explanation as to the predicate for the award of interest but did state with respect to the contention of one party that the "prime rate" should be utilized: "Ohio law prescribes the amount of interest which can be assessed and this is without reference to any 'prime rate' at all. The 'prime rate' is of no concern and will not be applied." The only other explanation of the trial court's determination is the statement that: "The maximum rate of interest in Ohio is set forth in @ 1343.01(A), ORC, at 8% per annum."

Apparently, the trial court felt bound by R.C. 1343.01(A) and, accordingly, set an eight percent rate. However, R.C. 1701.85 specifically does not refer to a statutory rate of interest but, instead, requires that the trial court determine a rate of interest that will be equitable. Moreover, the

eight percent interest limitation of R.C. 1343.01(A) concludes with statement: "except as authorized in division (B) of this section." At all pertinent time, R.C. 1343.01(B)(5) provided that:

"Any party may agree to pay rate of interest in excess of the maximum rate provided in division (A) of this section when:

"* * *

"(5) The instrument is payable on demand or in one installment and is not secured by household furnishings or other good used for personal, family, or household purposes."

Accordingly, the limitation of R.C. 1343.01(A) as to the rate of interest which may be provided in an instrument of writing cannot apply here even by analogy since the payment is to be made in one installment and is not secured. Moreover, R.C. 1343.03(A), since July 5, 1982, has provided for interest at the rate of ten percent, to be awarded in cases not otherwise provided. Prior to July 5, 1982, the rate was eight percent.

Here, the trial court did not determine an equitable rate of interest predicated upon evidence but, instead, applied a statutory rate which is neither applicable nor controlling. Accordingly, Armstrong, et al.'s second assignment of error is well-taken.

The third assignment of error relates to a holding of the trial court in granting partial summary judgment that the written demands for payment of fair cash value of forty-eight plaintiffs were ineffective because they were signed by an attorney-in-fact, rather than by the stockholders, and evidence of the authority of the attorney-in-fact to act was not delivered either with the demand or within the ten-day period for filing such demand prescribed by R.C. 1701.85(A)(2), which provides in pertinent part that:

"* * * Not later than ten days after the date on which the vote on such proposal was taken at the meeting of the shareholders, the shareholder must deliver to the corporation a written demand for payment to him of the fair cash value of the shares as to which he seeks relief, stating his address, the number and class of such shares, and the amount claimed by him as the fair cash value of the shares."

The trial court found the demands to be ineffectual based upon Klein v. United Theaters Co. (1947), 148 Ohio St. 306, the third paragraph of the syllabus of which states in pertinent part:

"There is a failure to comply with the requirements contained in section 8623-72, General Code * * * where the shareholder * * * did not personally make an objection in writing to the corporation and demand the fair cash value of his shares, and the only written objection and demand on behalf of the shareholder was made by an agent who was a stranger to the corporation and furnished no proof of his authority or agency, although the shareholder did not vote in favor of the sale." Although in the fourth paragraph of Klein, it is expressly held that a shareholder may act through an agent, there is a caveat that, to be effective, the agent must have been authorized by a writing signed by the shareholder and "exhibited or made known to the corporation."

The pertinent provision of G.C. 8623-72, as quoted in the opinion in Klein provided that a dissenting shareholder will be entitled to the fair cash value of his shares "* * * 'if such shareholder within twenty days after the day on which the vote was taken, shall object in writing to the action so taken and shall demand in writing the payment of such fair cash value of his shares.'" Thus, there has been a change in the language of R.C. 1701.85 from that in G.C. 8623-72, not only by the elimination of the requirement that there be an objection in writing but also by the substitution of the words "Written demand" for the words "demand in writting," and by the addition of the requirement that the demand include the address of the dissenting shareholder. Notwithstanding these changes, and Armstrong's argument as to the illogic of the conclusion in Klein, nevertheless, we find no basis in this case for finding that Klein has been superseded by legislative action. We did distinguish Klein in Price v. Marathon Oil Co. (1983), 11 Ohio App. 3d 106, but upon a different basis, namely, that Klein involved action by an agent, rather than by a fiduciary, as was involved in Price.

However, there are factual differences between the circumstances herein involved and that involved in Klein. In Klein, no written authority for the agent existed, and it was not until pendency of the action in court that the shareholders signed a statement confirming their prior granting of oral authority to the agent to file on the shareholder's behalf a written statement objecting to the action taken and demanding payment of the fair cash value of the stockholder's shares. In addition, the syllabus of Klein is more limited in scope than some of the language in the opinion in Klein relied upon by both the trial court and Marathon, it being stated in the opinion of 324: "It necessarily follows that such written authority must be

displayed to or filed with the corporation within the time limited." However, the fourth paragraph of they syllabus of Klein expressly provides that a shareholder may make his written demand "through an agent who has been authorized to act in the shareholder's behalf by a writing signed by him and exhibited or made known to the corporation."

Here, unlike Klein, there is no question but that the written authority did exist and was actually delivered to Marathon after the expiration of the ten-day period for filing the written demand, the written demand having been made by the attorney-in-fact on March 21, 1982, and the authority delivered on April 14 and 16, 1982.

Although the opinion in Klein states that the written authority of the agent must be displayed to or filed with the corporation within the time for filing the written demand, the syllabus of Klein requires only that the written authority of the agent he made known to the corporation and does not state that this must be accomplished within the time for filing the objection and demand. The trial court found Klein to provide that: "An agent whose authority is attached to the demand can act, but it has to be shown attached to the demand can act, but it has to be shown at the time of the demand." Klein, however, does not so hold.

Klein, in syllabus rule, merely requires that written authority for the agent to act exist and that the existence of such written authority be made known to the corporation. Even assuming that this must be accomplished within the time for filing the written demand by the shareholder, a factual issue exists herein as to whether the written authority existed, that is, whether a power of attorney making Armstrong the attorney-in-fact of the shareholders existed, and whether Marathon was made known of the existence of such written authority, that is a power of attorney, by the written demand itself. There is nothing in the syllabus of Klein requiring that the written authority or power of attorney be attached to and delivered with the demand itself. Accordingly, to this extent, and for this reason, Armstrong, et al.'s third assignment of error is well-taken.

By the fourth assignment of error, Armstrong, et al., contend that the trial court erred in finding that the powers of attorney executed on behalf of three of the plaintiffs were ineffective because they were not personally signed by the shareholder. With respect to plaintiff Auer, the power of attorney was executed by the shareholder's fiduciary. Our holding in Price, supra, requires a finding that the act of the fiduciary must be deemed to be the act of the ward. With respect to the other two plaintiffs, Hutchins and Lott, the powers of attorney to Armstrong were executed by individuals to whom Hutchins and Lott had given powers of

attorney. The powers of attorney given by Hutchins and Lott respectively were sufficiently broad to enable their attorneys-in-fact in turn to authorize Armstrong to act as an attorney-in-fact on behalf of the shareholder. Marathon has made no specific argument in opposition t this assignment of error. Finding the arguments of Armstrong, et al., to be reasonable under the circumstances, the fourth assignment of error is well-taken.

By the fifth assignment of error, Armstrong, et al., contend that the trial court erred in ruling the demand of plaintiff Kitzler to be ineffective. Although the Kitzler shares were in the joint names of William and Hester Kitzler, the demand was signed only by Hester Kitzler pursuant to an irrevocable stock or bond power executed by William Kitzler transferring his interest to Hester Kitzler, a copy of which was enclosed with the demand. Although, as pointed out by Marathon, R.C. 1701.01(F) defines a shareholder as being "a person whose name appears on the books of the corporation as the owner of shares of such corporation," at the very least, the document executed by William Kitzler was sufficient to vest in Hester Kitzler the power to act as his agent in making the written demand. Accordingly, the fifth assignment of error is well-taken.

By the sixth assignment of error, plaintiffs Armstrong, et al., contend that the trial court erred in defining the word "deliver" as used in R.C. 1701.85, to be accomplished only upon actual physical receipt by Marathon of a written demand.

Apparently, with respect to some of the plaintiffs written demands were mailed prior to the expiration of the ten-day period for making demand, but received by Marathon after the expiration of the ten-day period. R.C. 1701.85 requires the shareholder to "deliver to the corporation a written demand" within ten days after the vote on the proposal. Marathon relies upon certain authority relating to filing and contends that actual receipt is required within the ten-day period. However, the word "deliver" ordinarily connotes transfer of possession and is accomplished by any act be which the deliverer irrevocably relinquishes possession and control in such a fashion that receipt of possession by the transferree is assured. Depositing the notice in the mail is sufficient to accomplish delivery. Furthermore, with respect to the written demands, R.C. 1701.02 provides that: "If notice is permitted to be given by mail, the notice shall be deemed to have been given when deposited in the mail." Clearly, the written demand is a type of notice, and there appears to be no reason not to apply the provision of R.C. 1701.02 to the written demand. There is no contention, and no basis for contending, that the written demand must be delivered in person by the

shareholder to the office of the corporation. Accordingly, the trial court erred in not giving effect to written demands timely mailed to Marathon merely because they were received by Marathon after the expiration of the ten-day period.

By this assignment of error, Armstrong, et al., also contend that the trial court erred in finding that some of the plaintiffs failed timely to deliver their share certificates to Marathon upon request, even though they were mailed to Marathon within the fifteen-day period prescribed by R.C. 1701.85(A)(5), which provides that:

> "If the corporation sends to the dissenting shareholder, at the address specified in his demand, a request for the certificates representing the shares as to which he seeks relief, he shall, within fifteen days from the date of the sending of such request, deliver to the corporation the certificates requested * * *."

For the reasons stated above, the placing of the certificates in the mail addressed to Marathon constituted delivery within the contemplation of the statute. We see no reason for not applying the posting rule with respect to the delivery of the certificates. Where it is contemplated that an act will be consummated by use of mail, the act is complete when deposited in the mail. Accordingly, Armstrong, et al.'s sixth assignment of error is well-taken.

By the seventh assignment of error, Armstrong, et al., contend that the trial erred in finding that three plaintiffs had not demonstrated good cause for failure to deliver their share certificates to Marathon in accordance with R.C. 1701.85(A)(5). Apparently, these plaintiffs are the ones who mailed their certificates to Marathon before the expiration of the fifteen-day period, but the certificates were not recieved by Marathon until after expiration thereof. In light of our ruling with respect to the sixth assignment of error, the seventh assignment of error is well-taken, for, at the very least, reliance upon the posting rule would constitute good cause for failure to cause the certificates to be received by Marathon within the fifteen-day period in the absence of circumstances indicating to the countrary, none of which apparently exist herein.

By the eighth assignment of error, Armstrong, et al., contend that the trial court erred in failing to award all plaintiffs semi-annual payments of interest in accordance with R.C. 1701.85(E). The plaintiffs involved are apparently plaintiffs whom the trial court found to be ineligible to receive the fair cash value of their shares because of failure to comply with some procedural requirement of R.C. 1701.85. In light of our rulings with

respect to the other assignments of error, this assignment of error is well - taken.

For the foregoing reasons, and to the extend indicated, all eight of the assignments of error of Armstrong, et al., and the cross-assignment of error of Marathon are sustained; and the judgment of the Hancock County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with this opinion.

Judgment reversed and cause remanded.

n1 Additional issues are raised by separate companion appeals and are disposed of by separate opinions.

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Irving and Charlotte RADOL, A. James Ibold, Dwight C. Baum, the Crossett Charitable Foundation, Reuben B. Fishbein, Trustee for Teri Fishbein Hecht, Beneficiary, and Robert C. Utley, on Behalf of Themselves and All Others Similarly Situated, Plaintiffs-Appellants,

v.

W. Bruce THOMAS, William R. Roesch, David M. Roderick, United States Steel Corporation, USS Inc., USS Holdings Company, USS Merger Sub, Inc., Goldman, Sachs & Co., Marathon Oil Company, Harold D. Hoopman, Charles H. Barre, Elmer H. Graham, W.E. Swales, Jack H. Herring, Victor G. Beghini, Neil A. Armstrong, James A.D. Geier, J.C. Haley, J.N. Land, Jr., Raymond C. Tower, Robert G. Wingerter, and the First Boston Corporation, Defendants-Appellees.

No. 83-3598. Reported at 772 F.2d 244 54 U.S.L.W. 2184, Fed.Sec.L.Rep. P 92,289

Argued Jan. 22, 1985. Decided Sept. 13, 1985.

Before MERRITT and KENNEDY, Circuit Judges; and PECK, Senior Circuit Judge.

MERRITT, Circuit Judge.

This class action suit arises out of the fall, 1981 contest for control of Marathon Oil Company which ended in a two-stage merger of Marathon into United States Steel (Steel), one of the largest mergers in United States history. The first stage involved a tender offer by Steel for 51 per cent of Marathon's outstanding shares at $125 per share. The second stage was a "freezeout merger"—a merger in which the majority buys out the minority shareholders— with Marathon merged into Steel as a wholly owned subsidiary, and remaining Marathon shareholders receiving bonds worth approximately $76 per Marathon share. This suit is the consolidation of 13 separate actions challenging the two-step acquisition of Marathon by Steel as violative of the federal securities laws and state common law and fiduciary duty obligations. The three primary contentions underlying the various legal issues are that certain appraisals of Marathon's assets should

have been disclosed to Marathon shareholders at the tender offer stage of the transaction, that the two-tier transaction with a second stage merger price lower than the front-end tender offer price was illegally coercive, and that Marathon's directors breached their fiduciary duty to the shareholders by structuring such a transaction in order to preserve their control over Marathon.

This action was heard before Judge Rubin in the Southern District of Ohio, and all issues were decided in favor of the defendants, some on summary judgment and others after trial before a jury. On appeal, the plaintiffs raise a large number of essentially legal challenges to the proceedings in the District Court, but for the reasons set forth at length below, we reject these challenges and affirm the District Court's decision in all respects.

I. FACTUAL BACKGROUND

In October, 1981, Marathon was a widely held, publicly traded Ohio corporation with over 58 million shares held by over 35,000 stockholders. Marathon was a vertically integrated oil and gas company, conducting exploration, production, transportation, refining and marketing and research. From 1976 to 1980, Marathon's net revenues and profits advanced at average annual rates exceeding 15%, but the first half of 1981 brought lower worldwide demand for oil and a strengthened dollar, events causing a sharp reversal in Marathon's performance. Earnings per share plunged to $2.64 from $4.08 a year earlier, and during the June, 1981 quarter, Marathon's four U.S. refineries operated at only 58% of capacity. A. 2588, Def.Ex. 424.10. [22] The market price of a share of Marathon common stock, which had stood at $81 in November, 1980, fell to $45 in June, 1981. A. 2686, Def. Ex. 695.

Although Marathon's stock price had fallen during early 1981, the company held substantial long term oil and gas reserves, including the Yates Field in West Texas, one of the largest and most productive oil fields ever discovered, and along with a number of other oil companies, Marathon became a prime potential takeover target in the summer of 1981. In this threatening atmosphere, Marathon's top level management began preparations to defend against a hostile takeover bid. Harold Hoopman, Marathon's president and chief executive officer, instructed the company's vice presidents to compile a catalog of Marathon's assets. This document,

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[22] Throughout this opinion, "A" refers to the appendix on this appeal, "Def. (Pl.) Ex." refers to defendants' (plaintiffs') exhibit below, and "T" refers to the trial transcript.

1981), and secured a temporary restraining order prohibiting Mobil from purchasing any additional Marathon shares. Marathon's board and senior management meanwhile speedily contacted all of the thirty to forty companies who were considered reasonable merger candidates, while simultaneously advising shareholders by letter to reject Mobil's bid as "grossly inadequate." Both the Strong and First Boston reports were presented to potential merger partners in an attempt to kindle interest in Marathon.

Representatives of Steel and Marathon first met on November 10, 1981, at which time Hoopman gave Steel president David Roderick a copy of the asset valuation reports. On November 12, board member Elmer Graham, Marathon's vice president for finance, delivered financial information, including five-year earnings and cash flow projections to Steel in Pittsburgh. Negotiations between Hoopman and Roderick ended on November 17 in an offer by Steel to purchase up to 30 million shares (about 51%) of Marathon stock for $125 per share in cash, to be followed by a merger proposal in which each remaining Marathon shareholder would receive one $100 face value, 12 year, 121/2% guaranteed note per share of common stock.

On November 18, a formal meeting of Marathon's board was held to consider Steel's offer in light of competing, but more tentative, proposals from Allied Corporation and Gulf Oil Corporation. Allied's proposal was considered to be highly questionable, because it was premised upon Marathon's purchase of an Allied subsidiary at a greatly inflated price in order to give Allied the cash to bid $101-105 per share for a minority interest in Marathon. Gulf proposed to purchase 50% of the outstanding Marathon shares for $130-140 per share and then consummate a merger in which Marathon shareholders would receive securities worth $100-110 per share, but Marathon's counsel advised that a merger with Gulf would pose antitrust problems equal to if not more severe than those raised in Marathon's own antitrust suit against Mobil First Boston estimated that since current market interest rates were then in the 18 to 20% range, the second stage notes offered in Steel's proposal would sell for approximately $86 per share, yielding an average price, with the first stage tender offer at $125 per share, of $106 per share. First Boston then compared the 76.6% premium over market offered by Steel with other recent takeover premiums, showing that the premium offered by Steel greatly exceeded the average premium in recent control transactions. First Boston recommended that the board accept Steel's bid.

Steel's offer was communicated by Roderick over a conference telephone call to the entire Marathon board, and was offered on a take-it-or-leave-it basis, to remain open for one day. After Roderick's call, the board discussed Steel's offer, and outside director Land asked if there were any severance agreements or "golden parachutes" granted to Marathon's senior management in a side agreement. Hoopman answered that Steel had agreed only to cash out Marathon employee stock options held by the officers and upper level management at the expected average price offered by Steel to other Marathon shareholders of $106 per share, and that Steel had requested that the present Marathon board be kept intact. After this brief discussion, the directors were polled individually, and voted unanimously in favor of recommending that the shareholders accept Steel's offer. [23]

Steel mailed its tender offer on November 19, 1981, and simultaneously filed a Schedule 14D-1 with the SEC, as required by Rule 14d-3, 17 C.F.R. s 240.14d-3. Steel's tender offer specifically stated that the tender offer was the first step in "United States Steel's proposed acquisition of the entire equity interest" in Marathon, and described the terms of the second stage bond exchange. Def.Ex. 233, A. 2222, 2331-32. Hoopman sent a letter to Marathon's shareholders on November 19 in which he similarly described the two-tier transaction and recommended that shareholders accept Steel's tender offer. Def.Ex. 382, A. 2353. Marathon's Schedule 14D-9 attached to Hoopman's letter informed the shareholders of Gulf's proposal (describing Gulf anonymously as a "major oil company") and stated that this proposal had not been accepted

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[23] The description of the October 31 and November 18 board meetings is drawn from Armstrong's testimony, T. 1811-1856, A. 758-800; Hoopman's testimony on cross, T. 830-36, A. 356-62; and the minutes of Marathon board meetings, Def.Ex.'s 218-220, A. 1941-69. In the final agreement, Marathon also granted U.S. Steel an option to purchase up to 10,000 shares of Marathon common stock for $90 per share, and an option to purchase Marathon's interest in the Yates oil field for $2.8 billion if U.S. Steel's tender offer failed and another corporation succeeded in acquiring a majority interest in Marathon. On November 24, 1981, Mobil sued Marathon, U.S. Steel and directors of Marathon, seeking to enjoin the U.S. Steel tender offer. On December 23, 1981, this court invalidated both the stock and Yates Field options as "manipulative devices" under 14(e) of the 1934 Exchange Act, 15 U.S.C. s 78n(e), and ordered that the U.S. Steel tender offer be kept open for a reasonable time. On remand, the District Court set a withdrawal deadline for the U.S. Steel offer of midnight, January 6, 1982 (the original withdrawal date stated in the offer was December 17, 1981). Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir.1981).

referred to as the "Strong Report" or "internal asset evaluation," estimated the value of Marathon's transportation, refining and marketing assets, its other equipment and structures, and the value of proven, probable and potential oil reserves as well as exploratory acreage. This report, discussed at greater length in Starkman v. Marathon Oil Co., 772 F.2d 231, (6th Cir.1985), estimated the present value of oil and gas properties based on highly speculative assumptions regarding the level of prices and costs expected to prevail as far as thirty to fifty years into the future, and was described by Hoopman and John Strong, his assistant who was responsible for combining materials received from the various divisions into the final report, as a "selling document" which placed optimistic values on Marathon's oil and gas reserves so as to attract the interest of prospective buyers and ensure that Marathon could either ward off a hostile takeover attempt or at the very least obtain the best offer available and avoid being captured at a bargain price.

The Strong Report valued Marathon's net assets at between $19 billion and $16 billion, a per share value of between $323 and $276. A similar report using identical methodology but based only on publicly available information (excluding, therefore, potential and unexplored acreage) was prepared in mid- July 1981 by the investment banking firm of First Boston, which had been hired by Marathon to assist in preparing for potential takeover bids. The First Boston Report was similarly described as a "presentation piece" to avoid a takeover or to maximize the price obtained in a takeover, and it placed Marathon's net asset value at between $188 and $225 per share.

Marathon's market value was far below these appraised values, however, and on October 29, 1981, Marathon closed at $63.75 per share. The next day, Mobil Oil Company announced its tender offer to purchase up to approximately 68% of outstanding Marathon common stock for $85 per share in cash. Mobil proposed to follow the tender offer with a going-private or freezeout merger in which the remaining shareholders of Marathon would receive sinking fund debentures worth approximately $85 per share.

On October 31, 1981, Marathon's board of directors met in a day-long emergency session to consider Mobil's hostile tender offer. At this time, there were twelve members of Marathon's board, equally split between inside and outside directors. The inside directors were Hoopman and Marathon's five divisional vice presidents. The outside directors were N.A. Armstrong, former astronaut; J.A.D. Geier, the chairman of Cincinnati Milacron; J. Haley, vice president of Chase Manhattan Bank;

R.G. Weingerter, chairman of LOF; R.C. Tower, president of FMC; and J.N. Land, a former investment banker then engaged in financial consulting. Haley was the only director absent from the October 30, 1981 meeting.

The meeting began with a presentation by inside and outside legal counsel explaining the possible adverse antitrust implications of the Mobil offer and reviewing the legal obligations of the board to act in the best interests of Marathon's shareholders. Representatives of First Boston then delivered a lengthy presentation in which they compared the premium over market price offered by Mobil and stated their opinion that this premium was at best modest compared with other recent oil company takeovers. First Boston presented the results of its asset valuation report, but cautioned that the values did not represent realistic market values, as evidenced by the large number of companies whose market value was far less than their appraised value, and also that liquidation value would be significantly less than appraised value because of the relative bargaining positions in a liquidation, which in any event was felt to be an unrealistic response to Mobil's tender offer because of the length of time required to secure shareholder approval of a liquidation. First Boston urged the board to take quick action to find an alternative merger partner in the time remaining for shareholders to withdraw their tenders to Mobil, because even with potential antitrust problems, First Boston thought Mobil's offer still capable of succeeding.

After this presentation by First Boston, John Strong, Hoopman's assistant, spoke briefly and handed out the executive summary to the Strong Report. He described the document as a catalog that would be used in trying to sell the company to another bidder, and cautioned that there was very little correlation between the theoretical asset valuations and the market value of Marathon.

At the completion of these discussions, the outside directors met separately and unanimously determined to recommend that the board as a whole reject Mobil's offer, based on its potential illegality under the antitrust laws and the opinion of First Boston and the directors' own opinion that it was unfair to shareholders. The board as a whole then reconvened and unanimously agreed to recommend that shareholders reject Mobil's offer and authorized management to begin immediately the search for another potential bidder and also authorized counsel to file an antitrust suit seeking to enjoin Mobil from proceeding further with its bid.

On November 1, 1981, Marathon filed its antitrust suit against Mobil, Marathon Oil Co. v. Mobil Corp., 530 F.Supp. 315 (N.D.Ohio

because of anticipated antitrust problems. Id. Neither Steel's tender offer materials nor Hoopman's letter and attached Schedule 14D-9 revealed the existence of the Strong and First Boston reports and neither discussed Marathon's net appraised value, but Steel's tender offer did disclose that Steel had access to net income and cash flow projections for Marathon which were not publicly available, and those figures were set forth. Def.Ex. 233, A. 2228.

After Steel's tender offer was announced, the market price of Marathon stock rose, and fluctuated between $100 and $105 per share from November 19 until December 7. Def.Ex. 695, A. 2688-89. Mobil modified its offer in response to Steel's competing bid to provide for the purchase of 30 million shares at $126 per share, to be followed by a transaction in which the remaining shares would be exchanged for various securities to be valued at about $90 per share, and Mobil's offer remained open until enjoined on November 30 on the ground that it entailed probable antitrust violations. Marathon Oil Co. v. Mobil Corp., 530 F.Supp. 315 (N.D.Ohio), aff'd, 669 F.2d 378 (6th Cir.1981), cert. denied, 455 U.S. 982, 102 S.Ct. 1490, 71 L.Ed.2d 691 (1982). After this court invalidated both the stock and Yates Field options originally promised to Steel as manipulative devices under Section 14(e) of the Williams Act in Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir.1981), the withdrawal date on Steel's tender offer was set at January 6, 1982. Between the original withdrawal deadline of December 7 and January 6, 1982, Marathon stock traded at between $88 and $82 per share. Def.Ex. 695, A. 2688-89. By this latter date, a total of over 53 million shares, or 91.18% of the total outstanding had been tendered to Steel, and Steel purchased the promised 30 million shares on a pro rata basis on January 7.

On February 8, 1982, a proxy statement was sent to the remaining Marathon shareholders announcing a March 11, 1982 shareholder meeting at which the merger with Steel would be consummated if approved by two-thirds of the Marathon stockholders, as required by Ohio law. [24] The proxy statement discussed the Strong and First Boston appraisals at some

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[24] Ohio Revised Code 1701.78(F) provides in pertinent part: The vote required to adopt an agreement of merger or consolidation at a meeting of the shareholders of a constituent domestic corporation is the affirmative vote of the holders of shares of that corporation entitling them to exercise at least two-thirds of the voting power of the corporation on such proposal or such different proportion as the articles may provide, but not less than a majority, and such affirmative vote of the holders of shares of any particular class as is required by the articles of that corporation.

length, as is required in freezeout mergers by Rule 13e-3, 17 C.F.R. s 240-13e-3, warning, however, that the First Boston Report "should not be regarded as an independent evaluation or appraisal of Marathon's assets," and that the two reports were not "viewed by Marathon's Board of Directors as being reflective of ... per share values that could realistically be expected to be received by Marathon or its shareholders in a negotiated sale of the Company as a going concern or through liquidation of the Company's assets." Def.Ex. 756, A. 2707-08.

On March 11, 1982, the special shareholder meeting was held, and the shareholders approved the merger, with approximately 55% of the non-Steel Marathon shareholders voting for the merger, 20% voting against the merger, and 25% abstaining or not voting. A. 3525, Doc. 147. Marathon stock had traded at between $76 and $73 from the January 6 purchase date to the date of the shareholder meeting, indicating that the market eventually valued the bonds received in the merger at roughly $10 per share less than was forecast by First Boston.

II. SUMMARY OF PROCEEDINGS BELOW

The present class action suit represents the consolidation of thirteen separate actions by former Marathon shareholders asserting claims against Marathon, Steel, their directors (as of November, 1981) and investment bankers. The plaintiff class consists of two subclasses: Marathon shareholders who owned stock on November 19, 1981 and did not tender to Steel; and those who did tender to Steel. The plaintiffs presented claims under the federal securities laws and alleged state common law fraud and breach of fiduciary duty. Of these various claims, there are five substantive issues involved in this appeal, and we briefly summarize the treatment of these issues below before discussing our disposition of each in more detail.

On February 2, 1983, Judge Rubin granted defendants' motion for summary judgment on all of the plaintiffs' federal securities law claims except the claim that the failure of the Marathon and Steel defendants to disclose the Strong and First Boston Reports in the tender offer materials violated Section 10(b) of the Securities and Exchange Act of 1934 (the Exchange Act), 15 U.S.C. s 78j(b), SEC Rule 10b-5, 17 C.F.R. s 240.10b-5, and Section 14(e) of the Williams Act, 15 U.S.C. s 78n(e). [25]

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[25] Section 10(b) provides: It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange— * * * To use or employ, in connection with the purchase or sale of any security registered on a

Plaintiffs claimed that the failure to disclose these documents in the tender offer materials constituted the omission of material facts necessary to make the other statements made not misleading. In Radol v. Thomas, 556 F.Supp. 586, 593-94 (S.D.Ohio 1983), the District Court ruled that under the definition of materiality set forth in TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976), the issue of whether the Strong and First Boston asset appraisals were material facts was a question "best left to a jury." In answer to questions 1 and 2 of the special interrogatory, the jury found unanimously that the omission of these reports from the tender offer materials distributed on November 19, 1981, did not violate the federal securities laws. T. 2667, A. 1053.

The District Court entered summary judgment for the defendants on plaintiffs' claim that the tender offer materials constituted proxy solicitations because they represented the tender offer and second stage merger as a unitary transaction and violated Section 14(a) of the Exchange Act because they failed to comply with the proxy disclosure rules. [26] Judge Rubin reaffirmed the view (as expressed in his decision denying

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national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. Section 14(e) provides, in pertinent part: It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. Rule 10b-5 provides: It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, (1) to employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

[26] Section 14(a) provides: It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 781 of this title.

plaintiffs' motion for a preliminary injunction) that "a tender offer and merger are distinct acts with separate consequences toward which the securities laws and SEC Rules are directed in their regulatory schemes," and that references to the second stage merger in the tender offer materials were made in compliance with SEC rules governing tender offers and "were not the equivalent of solicitations for the merger which would call forth application of the full panoply of the proxy rules." 556 F.Supp. at 591 (quoting Radol v. Thomas, 534 F.Supp. 1302, 1314 (S.D.Ohio 1982)).

On the final federal securities claim at issue on this appeal, the District Court ruled that the two-tier merger of Marathon and Steel did not constitute market "manipulation" in violation of Section 10(b) of the Exchange Act or Section 14(e) of the Williams Act. 556 F.Supp. at 589-90. Judge Rubin observed that although the disparity between the front-end tender offer price offered by Steel and the back-end merger price did place pressure on Marathon shareholders to accept the tender offer, all tender offers are to some extent coercive, but the two-tier tender offer here did not "circumvent the natural forces of market demand" and did not discourage competing offerors and was therefore not "manipulative" under our interpretation of the term in Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir.1981).

The District Court refused to grant summary judgment for the defendants on plaintiffs' state law claim that Marathon's board violated their fiduciary duty to Marathon's shareholders by structuring a coercive two-stage transaction and consummating the merger at an unfair price, by failing to disclose the Strong and First Boston reports and other material information, and by cashing out their stock options at terms that were unavailable to other Marathon shareholders. A. 3316-18, 3321-22. The jury subsequently unanimously found that Marathon's directors had not breached their fiduciary duties to Marathon shareholders. A. 2667.

The District Court, however, entered summary judgment for Steel on plaintiffs' fiduciary duty claims, finding that Steel's involvement as a fiduciary was only as a majority shareholder of Marathon after the tender offer and only with respect to consummation of the second stage merger. Judge Rubin held that under Ohio law, a dissenting minority shareholder's sole remedy to redress his dissatisfaction with a freezeout merger is the statutory appraisal action provided by O.R.C. s 1701.85(A), provided that the merger is authorized by statute. A. 3318.

III. DISCUSSION: FEDERAL SECURITIES ISSUES

A. Duty to Disclose the Strong and First Boston Appraisals

Rule 13e-3(e), 17 C.F.R. s 240.13e-3(e), requires the disclosure of certain information set forth in Schedule 13E-3, 17 C.F.R. s 240.13e-100, in freezeout merger proxy statements. Item 9 of Schedule 13E-3 requires that a summary of any asset appraisal prepared in connection with such a merger must be furnished, and the summary must describe the methods, results and underlying assumptions of the appraisal. Steel complied with this rule by describing the Strong and First Boston reports in the second stage merger proxy statement. Plaintiffs contend, however, that such disclosure should also have been made in the tender offer materials distributed to shareholders by Marathon and Steel, and that the failure to disclose these reports violated Section 10(b) of the Exchange Act, Rule 10b-5, and Section 14(e) of the Williams Act because it constituted an omission of material facts necessary to make not misleading other affirmative statements made in the tender offer materials.

On appeal, plaintiffs particularly challenge the trial court's jury instructions on materiality and the duty to disclose these reports. The disputed instructions state:

> An omitted fact is material if there is a substantial likelihood that a reasonable person would consider it important in deciding whether to tender his stock.
>
> Only disclosure of existing material facts is required. Economic forecasts are not.
>
> A failure to make known a projection of future earnings is not a violation of the Federal Securities law.
>
> T. 2647-48, A. 1045-46.

In Starkman v. Marathon Oil Co., 772 F.2d 231, (6th Cir.1985), we have reaffirmed our adherence to the basic rule established by our prior decisions that tender offer materials must disclose soft information, such as these asset appraisals based upon predictions regarding future economic and corporate events, only if the predictions underlying the appraisal are substantially certain to hold. The Supreme Court's test for materiality as set forth in TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 450, 96 S.Ct. 2126, 2132, 48 L.Ed.2d 757 (1976), is whether there is a "substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder." The District Court's instructions to the jury

accurately stated this general test for materiality and the specific rule in this circuit governing the duty to disclose asset appraisals, and we have, in any event, held in Starkman that there was no duty to disclose the asset appraisals at issue here.

Indeed, if there was an error below on this issue, it was in allowing it to reach the jury. There is no other reported decision sending the materiality of an asset appraisal to the jury; every such decision involving an asset appraisal has held that there was no duty to disclose the appraisal. [27] Judge Rubin ruled that the Strong and First Boston reports were not immaterial as a matter of law because "(i)t is conceivable that a 'reasonable shareholder' would have accorded the valuations 'actual significance' in his deliberations, even if disclosure would not have altered his decision." Radol v. Thomas, 556 F.Supp. 586, 594 (S.D.Ohio 1983) (emphasis supplied). But the Supreme Court in TSC Industries v. Northway, 426 U.S. at 445-48, 96 S.Ct. at 2130-32, specifically reversed the court of appeals' definition in that case of material facts as all those which a reasonable shareholder might consider important, a definition which is essentially identical to Judge Rubin's ruling that the Strong and First Boston reports could be found to be material because a reasonable shareholder conceivably could consider them important. The purpose of the more stringent "substantial likelihood" test for materiality is to lessen the uncertainty facing corporate officials in determining what must be disclosed while preserving shareholders' access to all truly factual information. Even with the correct instructions on materiality, sending the issue to the jury on the basis of an incorrect application of the test for materiality introduces great uncertainty regarding a particular jury's view of "substantial likelihood," and under our decisions, the District Court should have ruled that the reports were not material and removed the issue from the jury.

B. Failure to Comply with the Proxy Rules

Plaintiffs claim that since the tender offer and the merger were viewed and represented by Steel and Marathon as a "unitary transaction," Marathon and Steel's tender offer materials constituted solicitations of shareholder consent to the proposed merger and should have contained all the information required to be included in a proxy statement under Section

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[27] See the discussion in Starkman v. Marathon Oil Co., 772 F.2d 231, (6th Cir.1985), and the compilation of cases in Flynn v. Bass Brothers Enterprises, Inc., 744 F.2d 978, 986, 988 (3d Cir.1984).

14(a) of the Exchange Act. Relying on recent law review commentary, [28] plaintiffs argue that the two- tier tender offer put the typical Marathon shareholder in a position where he had to assume that if he tendered, he would virtually assure Steel's ability to consummate the merger, and that shareholders thus should have received all the information needed to evaluate the merger prior to the deadline tendering. The only judicial authority adduced in support of the plaintiffs' position is Judge Learned Hand's ruling in SEC v. Okin, 132 F.2d 784, 786 (2d Cir.1943), that "writings which are part of a continuous plan ending in solicitation and which prepare the way for its success" are subject to the SEC's power to regulate proxy solicitations.

In rejecting this claim on the defendants' summary judgment motion, Judge Rubin correctly ruled that "a tender offer and subsequent merger are distinct acts with separate concerns toward which the securities laws and SEC rules are directed in their regulatory schemes," and that it was "entirely appropriate to consider each step in such a transaction separately." Radol v. Thomas, 556 F.Supp. 586, 591 (S.D.Ohio 1983). Steel complied with Rule 14d-3, 17 C.F.R. s 240.14d-3, by filing a Schedule 14D-1 with the Commission which disclosed the basic terms of the proposed merger with Marathon, as required by Item 5(a) of 17 C.F.R. s 240.14d-100. As the target, Marathon complied with Rule 14e-2, 17 C.F.R. s 240.14e-2, by sending a letter to its shareholders recommending acceptance of Steel's offer and describing the two-stage plan, and Marathon also complied with Rule 14d-9, 17 C.F.R. s 240.14d-9 by filing a Schedule 14D-9 with the Commission which described the basic terms of the merger. Both Steel and Marathon therefore complied with the specific disclosure requirements which apply to tender offers.

Requiring compliance with the proxy rules, in particular Rule 14a-9, 17 C.F.R. s 240.14a-9, or the specific freezeout merger proxy disclosure requirements in Rule 13e-3, 17 C.F.R. s 240.13e-3, in the tender offer stage of a two-tier transaction of this sort would be unfair because it would subject the tender offeror and target to the risk of liability for violating Section 5 of the Securities Act of 1933, 15 U.S.C. s 77e, by making an "offer to sell" securities prior to filing a registration statement

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[28] Plaintiffs rely on Brudney and Chirelstein, Fair Shares in Corporate Mergers and Takeovers, 88 Harv.L.Rev. 297, 330-40 (1974), and Brudney and Chirelstein, A Restatement of Corporate Freezeouts, 87 Yale L.J. 1354, 1361-62 (1978), where the authors argue that two-tier tender offers involving a second stage merger at a lower price than the front end tender offer are inherently coercive and should be prohibited.

for the securities. [29] In Securities Act Release No. 33-5927, reprinted in 3 Fed.Sec.L.Rep. (CCH) p 24,284H (April 24, 1978), the Commission stated that the Section 5 "jumping the gun" prohibition would not apply to disclosure of a proposed second stage merger in tender offer materials as required by Schedule 14D-1, because to rule that such disclosure constituted an offer to sell would not further the policies of the 1933 Act and would be inconsistent with the Williams Act policy of requiring such information in order to provide full disclosure to investors confronted with an investment decision in the context of a tender offer. However, the Commission also warned that disclosure at the tender offer stage should not go beyond that specifically required by the Williams Act and the tender offer rules, and that "statements which are not required by the Williams Act may constitute an 'offer to sell' the securities to be exchanged in the subsequent merger and, in the absence of a registration statement filed with the Commission at the commencement of the tender offer, may constitute a violation of Section 5 of the 1933 Act." 3 Fed.Sec.L.Rep. at 17,754. The plaintiffs' proposed extension of the comprehensive proxy statement disclosure requirements to the tender offer stage of a two-tier transaction thus risks placing the board in a completely untenable position in which liability attaches under the proxy rules for too little disclosure and under the 1933 Act for too much disclosure, a result we are unwilling to endorse. Accord Sheinberg v. Fluor Corp., 514 F.Supp. 133, 137 (S.D.N.Y.1981); American General Corp. v. NLT Corp., (1982 Transfer Binder) Fed.Sec.L.Rep. (CCH) p 98,808, at 94,142 (S.D.Texas July 1, 1982).

In addition, unlike SEC v. Okin, 132 F.2d at 786, where Judge Hand found that the Commission "would be powerless to protect shareholders" from misleading letters concerning an ongoing proxy solicitation sent in preparation for a soon-to-follow competing solicitation unless the letters were themselves held to be proxy solicitations, the Commission has set forth disclosure requirements for tender offers, and there are sound policy reasons for treating tender offers differently, with respect to the volume and content of required disclosure, than proxy statements.

Contrary to the plaintiffs' assumption, an individual shareholder does not assure the success of the second stage merger by choosing to tender in the first stage. Rather, the merger occurs only if the tender offer

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[29] The securities involved here are the bonds to be exchanged for remaining Marathon shares in the second stage merger.

succeeds, and the success of the tender offer is determined by shareholders' collective valuation of the premium offered in relation to other competing offers (here, Mobil's outstanding tender offer). In the tender offer context, the market plays an important role in providing shareholders with information regarding the value of the target firm, and target management has an incentive to broker the best deal for shareholders and provide favorable, optimistic information to prospective bidders—precisely the kind of information the plaintiffs say was contained in the Strong and First Boston reports and precisely that which majority shareholders have an incentive to keep from the minority in an unfair freezeout merger. The more extensive legal disclosure requirements which apply to freezeout merger proxy statements are therefore justified by the fact that the law has given the majority the power to foreclose the ownership rights of the minority and has thereby eliminated the market as a correcting mechanism, leaving minority shareholders with only the option of dissent and appraisal, an option which cannot rationally be exercised unless the majority is compelled to make full disclosure regarding appraisals, earnings projections and other information that sheds light on the value of the firm. Cf. Toms, Compensating Shareholders Frozen Out in Two-Step Mergers, 78 Colum.L.Rev. 548, 554-60 (1978) (observing how the negotiating position of management in a unitary merger differs fundamentally from that of the corporation's individual shareholders in a tender offer).

For these reasons, neither Steel nor Marathon had a duty to comply with the proxy rules in their tender offer statements.

C. The Two-Tier Tender Offer as Manipulation Under the Federal Securities Laws

In alleging that the two-tier, front-end-loaded acquisition of Marathon by Steel was a coercive and manipulative device, in violation of Section 14(e) of the Williams Act, Section 10(b) of the Exchange Act, and Rule 10b-5, plaintiffs have directly attacked the structure of this transaction as coercive, and have neither alleged below nor argued in this appeal that the two-tier transaction was not fully disclosed in Steel and Marathon's tender offer materials or that shareholders were in any manner deceived as to the nature of the transaction. In Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 477-79, 97 S.Ct. 1292, 1302-04, 51 L.Ed.2d 480 (1977), the Supreme Court held that allegations of deception or nondisclosure were essential to state a cause of action under Section 10(b). Based in large part on the interpretation of "manipulative" in Santa Fe Industries, and also on its reading of the legislative history of the Williams Act, the Court recently

ruled in Schreiber v. Burlington Northern, Inc., — U.S. ——, 105 S.Ct. 2458, 2465, 86 L.Ed.2d 1 (1985), that without misrepresentation or nondisclosure, Section 14(e) of the Williams Act has not been violated, thereby rejecting this court's previous analysis in Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (1981). Since the plaintiffs have failed to allege nondisclosure or misrepresentation of the two-tier transaction, but have instead attacked its structure, they have failed to state a claim under either Section 10(b) (and Rule 10b-5) or Section 14(e) and we affirm the District Court's entry of summary judgment for the defendants on this issue.

IV. STATE LAW ISSUES

A. Breach of Fiduciary Duty by Marathon's Directors

Plaintiffs initially argue that the District Court erroneously granted summary judgment on their claim that in structuring the coercive two-tier acquisition—including the intentional establishment of an unfairly low second stage price—Marathon's directors breached their fiduciary duty to the Marathon shareholders. The record, however, reveals otherwise. Judge Rubin specifically charged the jury that plaintiffs' claims included breach of fiduciary duty "by entering into an acquisition of Marathon by U.S. Steel on terms which were unfair to the shareholders of Marathon, and in particular to those shareholders who did not tender their shares to U.S. Steel." T. 2648, A. 1046. Moreover, the court's opinion denying the Marathon defendants' motion for summary judgment on the breach of fiduciary duty claim repeatedly characterizes that claim as revolving around "the Marathon directors' negotiation and approval of the structure and details of the two-step transaction ... a transaction which was, allegedly, inherently unfair." A. 3321-22.

Having allowed the issue to reach the jury, Judge Rubin gave the following charge on breach of fiduciary duty:

> I do instruct you that officers and directors of a corporation occupy a fiduciary relationship to the corporation and to its shareholders. A fiduciary must exercise the utmost good faith, and he must give undivided loyalty. He must be scrupulously honest.
>
> The exercise of the care, skill and diligence of a man of ordinary prudence dealing with his own property as a general rule fulfills the duty of a fiduciary.
>
> In dealing with shareholders, a corporate officer or director must disclose to them all material facts.

A fiduciary, however, is not a guarantor or insurer. He is not liable for mistakes in judgment made in good faith.

The fiduciary duty is not breached unless the directors committed fraud, or intentionally acted contrary to the best interest of the corporation and the shareholders.

T. 2649-50, A. 1047-48.

On appeal, plaintiffs argue that the District Court erred in instructing the jury that Marathon's directors violated their fiduciary duty to the shareholders only if they committed fraud or intentionally acted contrary to the best interest of the shareholders. Plaintiffs contend that the directors were not entitled to this instruction because they were under a conflict of interest due to Steel's assurance that the present board would be continued intact and Steel's agreement to cash out stock options held by upper- level management at the expected average price in the two-tier deal.

We must look to Ohio for the substantive law on this question, and in Ohio as in every other state, the long established principle is that directors of a corporation have an obligation to the corporation which is in the nature of that of a fiduciary. Ohio Drill & Tool Co. v. Johnson, 625 F.2d 738, 742 (6th Cir.1980); Nienaber v. Katz, 69 Ohio App. 153, 43 N.E.2d 322 (1942); 12 Ohio Jur.3d s 420, at 70-72 (1979). A director's obligation to the corporation includes two separate duties: the duty of loyalty and the duty of care. See ALI, Principles of Corporate Governance: Analysis and Recommendations, Introductory Note, Part IV, at 4 (Tent.Draft No. 4, April 12, 1985) (quoting The Corporate Director's Guidebook, 33 Bus.Law. 1591, 1599-1600 (1978) on the distinction between the duty of loyalty and the duty of care). The Ohio formulation of these duties was codified in 1984 in O.R.C. s 1701.59(B), and under the duty of loyalty, a "director shall perform his duties as a director ... in good faith, in a manner he reasonably believes to be in the best interests of the corporation," while under the duty of care, a director must perform his duties "with the care that an ordinary prudent person in a like position would use under similar circumstances."

Moreover, in evaluating a director's compliance with the duty of care, Ohio courts adhere to the "business judgment rule," and will not inquire into the wisdom of actions taken by the directors in the absence of fraud, bad faith or abuse of discretion. 12 Ohio Jur.3d s 415, at 63-64 (1979); Ohio National Life Insurance Co. v. Struble, 82 Ohio App. 480, 485, 81 N.E.2d 622, 625,appeal dismissed, 150 Ohio St. 409, 82 N.E.2d 856 (1948). See also O.R.C. s 1701.59(C), which states that "a person

who, as a director of a corporation, performs his duties in accordance with division (B) of this section (discussed above) shall have no liability because he is or has been a director of the corporation." The business judgment rule recognizes that many important corporate decisions are made under conditions of uncertainty, and it prevents courts from imposing liability on the basis of ex post judicial hindsight and lowers the volume of costly litigation challenging directorial actions. See generally 3A W. Fletcher, Cyclopedia of the Law of Private Corporations s 1039, at 37-38 (1975 ed.).

Plaintiffs contend, however, that the trial court's instructions were erroneous because they failed to state the proposition established by Ohio Drill & Tool Co. v. Johnson, 625 F.2d 738, 742 (6th Cir.1980), and Seagrave v. Mount, 212 F.2d 389, 397 (6th Cir.1954), that good faith and full disclosure to shareholders do not insulate a director from liability if he has placed himself in a position of conflicting loyalties to the corporation and his own private interest. We find no conflict between these cases and the substance of the trial court's instructions. Both Ohio Drill & Tool and Seagrave v. Mount simply apply the rule that directors owe a duty of loyalty to the corporation and are not entitled to the discretion permitted by the business judgment rule when they are interested in a corporate control transaction which is the subject of their business judgment as directors. The trial court's instructions may not possess the clarity of a restatement, but in explicitly telling the jury that a fiduciary "must give his undivided loyalty" to the corporation and breaches his duty if he intentionally acts contrary to the best interests of the corporation, the court accurately stated the law in a manner consistent with Ohio Drill & Tool and Seagrave v. Mount.

In light of recent Supreme Court decisions severely restricting the substantive content of the federal securities laws as applied to tender offers and takeovers, and emphasizing the traditional role of state law in regulating the fairness of corporate control transactions, see, e.g., Schreiber v. Burlington Northern, — U.S. ——, 105 S.Ct. 2458, 86 L.Ed.2d 1 (1985); Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977), we have no wish to narrow the scope of state law fiduciary duties. Tender offers almost always present a potential conflict of interest for managers. But we cannot accept plaintiffs' underlying contention that in the context of corporate control transactions the burden of proof shifts to the directors to establish the fairness to shareholders of any transaction that would have the effect of retaining the directors' control. We reject the view that the stock option agreement and

employment assurance alone placed the directors in a position of conflicting loyalties so that the burden of proof shifted to the defendants. Although there are no reported Ohio decisions addressing this contention, it has been rejected overwhelmingly in recent decisions from other jurisdictions involving an attack on the actions of corporate directors allegedly taken for the purpose of preserving corporate control in the face of a hostile tender offer, Panter v. Marshall Field & Co., 646 F.2d 271, 295 (7th Cir.), cert. denied, 454 U.S. 1092, 102 S.Ct. 658, 70 L.Ed.2d 631 (1981); Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690, 701-03 (2d Cir.1980); Treadway Cos. v. Care Corp., 638 F.2d 357, 381 (2d Cir.1980), and the general rule remains that directors carry the burden of showing that a transaction is fair and in the best interests of shareholders only after the plaintiff has made a prima facie case showing that the directors have acted in bad faith or without requisite objectivity. Norlin Corp. v. Rooney, Pace Inc., 744 F.2d 255, 264 (2d Cir.1984); ALI, Principles of Corporate Governance: Analysis and Recommendations, s 4.01 at 6, 11 (Tent.Draft No. 4, April 12, 1985) (protections of business judgment rule removed only if a challenging party can sustain his burden of showing the director was not acting in good faith or with disinterest, or was not informed as to the subject of his business judgment).

It may be that some corporate control events, such as the payment of greenmail, should shift the burden of proof and invoke close judicial scrutiny, see Note, Greenmail: Targeted Stock Repurchase and the Management-Entrenchment Hypothesis, 98 Harv.L.Rev. 1045, 1056-59 (1985), but here the transaction merely provided that long term stock options—held by upper level management only and not by the outside directors—would be cashed out at the anticipated average price in the two-tier transaction, and that the officer-directors would be continued in their present positions, although their employment remained terminable at will. There were no severance payments or "golden parachutes" involved, and unlike Norlin, where the board of directors effectively assured itself voting control over the company in order to ward off hostile stock purchases by issuing new common and preferred to its wholly owned Panamanian subsidiary and to a newly created employee stock ownership plan, the ultimate decision on the proposed transaction with Steel was made by the shareholders in deciding to tender their shares and vote for the merger, thus preserving the fundamental principle of corporate governance that shareholders must control decisions affecting the corporation's survival as a legal entity.

B. Marathon's Liability for Breach of Fiduciary Duty

The plaintiffs maintain that the District Court erred in instructing the jury that Marathon had no fiduciary duty to its shareholders and that plaintiffs' claim for breach of fiduciary duty was limited to its claim against Marathon's directors. Plaintiffs say that Marathon itself owed a fiduciary duty to its shareholders, because the fiduciary duty of an officer or director derives from his position as a representative of the corporation, or alternatively, that the fiduciary duty of an officer or director creates a fiduciary duty in the corporation.

Plaintiffs' argument is based on a fundamental misunderstanding of the nature of the corporate director's fiduciary relationship. A corporation is a legal entity created in derogation of the common law and the obligations of the corporation are defined by statute, as are the rights of shareholders. Under O.R.C. ss 1701.59(A) and (B), except where the law, articles of incorporation or corporate regulations require action to be authorized by shareholders, all of the authority of a corporation is to be exercised under the direction of the corporation's directors, who must act in a manner they reasonably believe to be in the corporation's best interests. The directors stand, roughly, as trustees over the corporation, administering it for the benefit of the beneficial owners, the shareholders. See 3 W. Fletcher, Cyclopedia of the Law of Private Corporations s 848 (1975 ed.). Liability for breach of the directors' fiduciary obligation could not possibly run against the corporation itself, for this would create the absurdity of satisfying the shareholders' claims against the directors from the corporation, which is owned by the shareholders. There is not, and could not conceptually be any authority that a corporation as an entity has a fiduciary duty to its shareholders. See Jordan v. Global Natural Resources, Inc., 564 F.Supp. 59, 68 (S.D.Ohio 1983).[30]

Similarly, although a corporation may be held vicariously liable to third parties for acts of directors and officers within their authority as representatives of the corporation, see, e.g., Marbury Management, Inc. v. Kohn, 629 F.2d 705 (2d Cir.), cert. denied, 449 U.S. 1011, 101 S.Ct. 566, 66 L.Ed.2d 469 (1980), such vicarious liability has been sparingly imposed, primarily on brokerage firms in dealings with customers because of the special duty owed by brokers to customers. Sharp v. Coopers &

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[30] The cases plaintiffs cite for the proposition that a corporation may have a fiduciary duty to shareholders all involve situations where the corporation owed a fiduciary duty to minority shareholders of a second corporation of which it was majority shareholder. See, e.g., Southern Pacific Co. v. Bogert, 250 U.S. 483, 491-92, 39 S.Ct. 533, 536-37, 63 L.Ed. 1099 (1919); Zahn v. Transamerica Corp., 162 F.2d 36, 42 (3d Cir.1947).

Lybrand, 649 F.2d 175, 182 (3d Cir.1981). Plaintiffs have cited no case in which a corporation has been held vicariously liable to its shareholders for its directors' breach of fiduciary duty, and such a result would be flatly inconsistent with the rationale of vicarious liability, since it would shift the cost of the directors' breach from the directors to the corporation and hence to the shareholders, the class harmed by the breach.

C. Joint and Several Liability of the Marathon Defendants, and Other State Law Claims

The plaintiffs assert that the jury verdict form on breach of fiduciary duty was erroneous because it did not permit the jury to find that some Marathon directors were liable while others were not and essentially instructed the jury that only joint and several liability could be found. Plaintiffs say this verdict form was particularly prejudicial because some of the directors, the officer-directors in particular, had greater knowledge and conflicts of interest than did others, and because of the inclusion of a prominent national hero, astronaut Neal Armstrong, an outside director, along with the other directors.

The Marathon board unanimously approved the merger with Steel, and unanimously agreed to oppose Mobil's offer, and the evidence was uncontroverted that these decisions were taken by the board as a whole. (See Hoopman testimony at T. 832-37, A. 358-63.) The law is clear that directors and officers of a corporation are jointly and severally liable if they jointly participate in a breach of fiduciary duty or approve, acquiesce in, or conceal a breach by a fellow officer or director. Ohio Drill & Tool Co. v. Johnson, 625 F.2d at 742; Nienaber v. Katz, 69 Ohio App. 153, 43 N.E.2d 322 (1942); 3 W. Fletcher, Cyclopedia of the Law of Private Corporations s 1002, at 546-47 (1975 ed.). Moreover, there is no authority in Ohio for the proposition that outside directors must be treated differently with respect to joint decisions by the entire board.

Plaintiffs also contend that Steel could have been found jointly liable at the tender offer stage for knowingly joining in a breach of fiduciary duty by Marathon's directors, but there is no authority for this exceptionally problematic notion, and the contention is in any event moot given that the jury, on the basis of correct instructions, found unanimously that Marathon's directors had not breached their fiduciary duty. Plaintiffs' attack on the trial court's failure to allow emendation of the complaint to include a claim that statements regarding the nature of the Strong and First Boston reports in the proxy materials were false and misleading is equally without merit. Similarly without merit is the plaintiffs' contention that the court's decision to admit the testimony of class member Fishbein was

reversible error, and we find all other miscellaneous points of error raised by the plaintiffs to be groundless.

Accordingly, the judgment of the District Court is affirmed.

The Supreme Court of Ohio
Columbus

1987 TERM
To wit: November 4, 1987

Frances A. Armstrong, et al.	:	
Dorothy M. Harrell		
Appellees/Cross Appellants	:	Case No. 86-399 to 405
v.	:	REHEARING ENTRY
Marathon Oil Company,	:	(Hancock County)
Appellant	:	

IT IS ORDERED by the court that rehearing in this case be, and the same is hereby, denied.

THOMAS J. MOYER
Chief Justice

I Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 4th day of November, 1987.

MARCIA J. MENGEL CLERK

_______________ DEPUTY

IN THE COURT OF COMMON PLEAS
HANCOCK COUNTY, OHIO

FRANCES A. ARMSTRONG, et al.,) Case No. 43273
Plaintiffs,) Judge Robert D. Walker

v.

MARATHON OIL COMPANY,
Defendant.) JUDGMENT ENTRY

April 6, 1988

Pursuant to the mandate issued by the Supreme Court of Ohio in Armstrong v. Marathon Oil Company, 32 Ohio St. 3d 397,419 (1987) that this matter be finally resolved "withoutrecourse to a further evidentiary hearing," the Court hasreviewed the trial transcript consisting of nearly 4,000 pagesand corresponding exhibits, has consulted the briefs submitted by the parties in respect to the issues of fair cash value andinterest, and has entertained oral argument on these issues.Upon due consideration of the entire record, the Court does ORDER, ADJUDGE and DECREE as follows:

1. All individuals and entities whose rights and interests are affected by this litigation, including class members who were ably represented throughout the original trial and subsequent appeals by counsel for Armstrong, et al., were given every opportunity by this Court to present evidence on the issue of fair cash value during the original month-long trial in 1983; thus, no Constitutional provisions are violated by this Court's adherence to the Supreme Court of Ohio's mandate that the matter finally be resolved "without recourse to a further evidentiary hearing." See Armstrong, 32 Ohio St. 3d at 419.
2. The correct date for the valuation of Marathon Oil Company stock is March 10, 1982. On that date, the market value of Marathon Oil Company stock was $75.75 per share.
3. This Court, having considered all the evidence, including but not limited to, the acknowledgement by plaintiffs' expert Amling that the price of Marathon ' s stock would have declined below $75.75 on that day in the absence of the pendency of the merger between Marathon and U.S. Steel Corporation; the confirmatory testimony by plaintiffs' experts Humphries and Harvey bearing upon the probable downward movement of the price of a stock upon withdrawal of a proposed

THE SUPREME COURT OF OHIO

1990 TERM

To wit: September 26, 1990

Frances A. Armstrong et al.,
Appellants,
v.
Marathon Oil Co.,
Appellee

:Case No. 90-979
:ENTRY

Upon consideration of the motions for an order directing the Court of Appeals for Hancock County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motions are overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by Clyde Kahrl.

(Court of Appeals Nos. 58811, 58812, 58813, 58814 & 58815)

THOMAS J. MOYER
Chief Justice

Reported 54 Ohio St. 3d 703 (1990)

CHAPTER 1701: OHIO GENERAL CORPORATION LAW

1701.85 (Relief to dissenting shareholder of domestic corporation.)

(A)(1) A shareholder of a domestic corporation is entitled to relief as a dissenting shareholder in respect of the proposals in sections 1701.74, 1701.76, and 1701.84 of the Revised Code, only in compliance with this section.

(2) In the case where the proposal must be submitted to the shareholders of the corporation involved, the dissenting shareholder must be a record holder of the shares of the corporation as to which he seeks relief as of the date fixed for the determination of shareholders entitled to notice of a meeting of the shareholders at which the proposal is to be submitted, and such shares must not have been voted in favor of the proposal. Not later than ten days after the date on which the vote on such proposal was taken at the meeting of the shareholders, the shareholder must deliver to the corporation a written demand for payment to him of the fair cash value of the shares as to which he seeks relief, stating his address, the number and class of such shares, and the amount claimed by him as the fair cash value thereof.

(3) In the case of a merger pursuant to section 1701.80 of the Revised Code,the dissenting shareholder must be a record holder of the shares of the corporation as to which he seeks relief as of the date on which the agreement of merger was adopted by the directors of that corporation. Within twenty days after there has been sent to him the notice provided in said section, the shareholder must deliver to the corporation a written demand for payment with the same information as that provided for in division (A)(2) of this section.

(4) In the case of a merger or consolidation, a demand served on the constituent corporation involved constitutes service on the surviving or the new corporation, whether served before, on, or after the effective date of the merger or consolidation.

(5) If the corporation sends to the dissenting shareholder, at the address specified in his demand, a request for the certificates representing the shares as to which he seeks relief, he shall, within fifteen days from the date of the sending of such request, deliver to the corporation the certificates requested, in order that the corporation may forthwith endorse thereon a legend to the effect that demand for the fair cash value of such shares has been made. The corporation shall promptly return such endorsed certificates to the shareholder. Failure on the part of the

extraordinary transaction; the testimony of plaintiffs' expert Amling, whose basic projections, when corrected for errors to which he admitted, yielded a price of between $64 .18 and $72 . 68 per share on March 10, 1982, had the merger not been pending; the testimony of plaintiffs' expert Humphries that oil stocks normally trade on the stock market at one-third of their "asset value;" the testimony of defendant's expert Hamada, that, absent the pending merger, Marathon stock would have traded for $47.43 a share on March 10, 1982; and documentation that-the price-of other oil-company stocks declined;over.30%:-during the approximately 4-1/2 months prior to-March- 10, =1982, -during which period the price of Marathon rose 19%; finds that the price of Marathon stock was appreciated from $68.43 to $75.75 due to the pending merger on March 10, 1982 .

4. Therefore, in accordance with Ohio Revised Code § 1701.85 and the Supreme Court of Ohio's interpretation thereof in its Armstrong opinion, the fair cash value of the plaintiffs' shares on March 10, 1982 is $68.43 .
5. This Court, having considered the evidence on the interest issue submitted by the parties, including, but not limited to, the prevailing rates of interest for various kinds of loans, the average prime rate, and other evidence, determines that an equitable rate of interest to be awarded to the plaintiffs as provided in O.R.C. § 1701.85(B) and the Supreme Court of Ohio's interpretation of the statute in its Armstrong decision, is 8-1/2% per annum.
6. Named plaintiffs and shareholders who have not opted out of the Armstrong class action shall be awarded $68.43 per share with simple interest at the rate of 8-1/2% per annum, commencing on March 11, 1982 and continuing until the fair cash value is remitted to plaintiffs by Marathon, or until 30 days after entry of judgment, whichever is the earlier: provided, however, that Marathon is entitled to deduct from that amount the total payments already made to each named plaintiff pursuant to this Court's Orders of September lo, 1982, March 22, 1983 and May 13, 1983, which Orders directed Marathon to make interim payments to shareholders pursuant to O.R.C. § 1701.85(E).
7. Plaintiffs, including named-party dissenters and class members who have not opted out of the class, shall deliver their Marathon Oil Company stock certificate(s), in person or by certified mail to Marathon's counsel of record or to such other person as the parties may mutually agree, not later than 30 days after entry of judgment. Upon receipt of the stock certificate(s), Marathon shall calculate the principal amount and interest due each plaintiff as determined by this

Court, less, with respect to each named plaintiff, the $62.15(28) already paid. This shall be done within 10 working days after Marathon has received the certificate(s) and Marathon shall remit the balance due to the plaintiff's counsel of record or to such other person as the parties may mutually agree.

8. Costs of this matter will be split equally between Marathon and the plaintiffs.

JUDGE ROBERT D. WALKER

shareholder to deliver such certificates terminates his rights as a dissenting shareholder, at the option of the corporation, exercised by written notice sent to him within twenty days after the lapse of the fifteen-day period above mentioned, unless a court for good cause shown otherwise directs. If shares represented by a certificate on which such a legend has been endorsed are transferred, each new certificate issued therefor shall bear a similar legend, together with the name of the original dissenting holder of such shares. A transferee of the shares so endorsed acquires only such rights in the corporation as the original dissenting holder of such shares had immediately after the service of a demand for payment of the fair cash value therof. Such request by the corporation is not an admission by the corporation that the shareholder is entitled to relief under this section.

(B) Unless the corporation and the dissenting shareholder shall have come to an agreement on the fair cash value per share of the shares as to which he seeks relief, the shareholder or the corporation, which in case of a merger or consolidation may be the surviving or the new corporation, may within three months after the service of the demand by the shareholder, file a complaint in the court of common pleas of the county in which the principal office of the corporation which issued such shares is located, or was located at the time when the same was adopted by the shareholders of the corporation, or, if the proposal was not required to be submitted to the shareholders, was approved by the directors. Other dissenting shareholders, within the period of three months, may join as plaintiffs, or may be joined as defendants in any such proceeding, and any two or more such proceedings may be consolidated. The petition shall contain a brief statement of the facts, including the vote and the facts entitling the dissenting shareholder to the relief demanded. No answer to such petition is required. Upon the filing of the petition, the court, on motion of the petitioner, shall enter an order fixing a date for a hearing on the petition, and requiring that a copy of the petition and a notice of the filing and of the date for hearing be given to the respondent or defendant in the manner in which summons is required to be served or substituted service is required to be made in other cases. On the day fixed for the hearing on the petition or any adjournment of it, the court shall determine from the petition and from such evidence as is submitted by either party whether the shareholder is entitled to be paid the fair cash value of any shares and, if so, the number and class of such shares. If the court finds that the shareholder is so entitled, the court may appoint one or more persons as appraisers to receive evidence and to recommend a decision on the amount of the fair cash value. The appraisers have such

power and authority as is specified in the order of their appointment. The court shall thereupon make a finding as to the fair cash value of a share, and shall render judgment against the corporation for the payment thereof with interest at such rate and from such date as the court considers equitable. The costs of the proceeding, including reasonable compensation to the appraisers to be fixed by the court, shall be assessed or apportioned as the court considers equitable. Such a proceeding shall be a special proceeding within the meaning of section 2505.02 of the Revised Code, and final orders in it may be vacated, modified, or reversed as provided in sictions 2505.01 to 2505.45 of the Revised Code. If during the pendency of any proceeding instituted under this section a suit or proceeding is or has been instituted to enjoin or otherwise to prevent the carrying out of the action as to which the shareholder has dissented, the proceeding instituted under this section shall be stayed until the final determination of the other suit or proceeding. Unless any provision in division (D) of this section is applicable, the fair cash value of the shares as agreed upon by the parties or as fixed under this section shall be paid within thirty days after the date of final determination of such value under this division or the effective date of the amendment to the articles or the consummation of the other action involved, whichever occurs last. Such payment shall be made only upon and simultaneously with the surrender to the corporation of the certificates representing the shares for which such payment is made.

(C) In the case where the proposal was required to be submitted to the shareholders of the corporation, fair cash value shall be determined as of the day prior to that on which the vote by the shareholders was taken, or, in the case of a merger pursuant to section 1701.80 of the Revised Code, the day before the adoption of the agreement of merger by the directors of the particular subsidiary corporation. The fair cash value of a share for the purposes of this section is the amount that a willing seller, under no compulsion to sell, would be willing to accept, and that a willing buyer, under no compulsion to purchase, would be willing to pay, but in no event shall the amount thereof exceed the amount specified in the demand of the particular shareholder. In computing such fair cash value, any appreciation or depreciation in market value resulting from the proposal submitted to the directors or to the shareholders shall be excluded.

(D) The right and obligation of a dissenting shareholder to receive such fair cash value and to sell such shares as to which he seeks relief, and the right and obligation of the corporation to purchase such shares and to pay the fair cash value thereof terminates if:

(1) Such shareholder has not complied with this section, unless the corporation by its directors waives such failure;

(2) The corporation abandons, or is finally enjoined or prevented from carrying out, or the shareholders rescind their adoption, of the action involved;

(3) The shareholder withdraws his demand, with the consent of the corporation by its directors;

(4) The corporation and the dissenting shareholder shall not have come to an agreement as to the fair cash value per share, and neither the shareholder nor the corporation shall have filed or joined in a petition under division (B) of this section within the period provided.

(E) From the time of giving said demand, until either the termination of the rights and obligations arising therefrom or the purchase of the shares by the corporation, all other rights accruing from such shares, including voting and dividend rights, are suspended. If during suspension, any dividend is paid in money upon shares of such class, or any dividend, distribution, or interest is paid in money upon any securities issued in extinguishment of or in substitution for such shares, an amount equal to the dividend, or interest which, except for the suspension, would have been payable upon such shares or securities, shall be paid to the holder of record as a credit upon the fair cash value of the shares. If the right to receive fair cash value is terminated otherwise than by the purchase of the shares by the corporation, all rights of the holder shall be restored and all distributions which, except for the suspension, would have been made shall be made to the holder of record of said shares at the time of termination.

HISTORY: 133 v S 158 (Eff 7-17-70); 135 v S 155 (Eff 9-30-74);